IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 88

UNITED STATES OF AMERICA

v.

W. G. REYNOLDS AND MARY N. REYNOLDS

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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APPENDIX

Relevant Docket Entries

1. Complaint in condemnation, filed April 16, 1962.
2. Declaration of Taking, tendered April 16, 1962.
3. Order to File Declaration of Taking, filed April 18, 1962.
4. Order for Delivery of Possession, entered April 18, 1962.
5. Answer of W. G. Reynolds, filed May 19, 1962.
6. Answer of Mary N. Reynolds, filed March 16, 1966.
7. Trial Order with jury verdict and interrogatory, filed May 24, 1967.
8. Judgment, filed June 5, 1967.
9. Notice of Appeal, filed June 22, 1967.
10. Decision of court of appeals, dated December 9, 1968.
11. Petition for rehearing, filed January 2, 1969, by the United States of America.
12. Order denying rehearing and modifying decision of court of appeals, filed January 24, 1969.
13. Order granting writ of certiorari, dated October 13, 1969.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT BOWLING GREEN

Civil Action No. 857

Complaint in Condemnation—Filed 4-16-62

UNITED STATES OF AMERICA, *Plaintiff*,

v.

811.92 ACRES OF LAND, more or less, situate in Edmonson and Hart Counties, State of Kentucky, and William R. Padgett, et al., *Defendants*.

1. This is an action of a civil nature brought by the United States of America at the request of the Secretary of the Army of the United States for the taking of property under power of eminent domain and for the ascertainment and award of just compensation to the owners and parties in interest.

2. The authority for the taking is the Act of Congress approved February 26, 1931 (46 Stat. 1421, 40 U.S.C. 258a), and acts supplementary thereto and amendatory thereof, and under the further authority of the Acts of Congress approved April 24, 1888 (25 Stat. 94, 33 U.S.C. 591), and March 1, 1917 (39 Stat. 948, 33 U.S.C. 701), which acts authorize the acquisition of land for flood control projects; the Act of Congress approved June 28, 1938 (Public Law 761—75th Congress), which act authorized the construction of the Nolin Reservoir; and the Act of Congress approved September 30, 1961 (Public Law 87-330), which act appropriated funds for such purposes.

3. The use for which the property is to be taken is to provide for a flood control project in connection with the establishment of the Nolin Reservoir on the Nolin River in Kentucky and for such other uses as may be authorized by Congress or by Executive Order.

4. The interest in the property to be acquired is:

(a) The fee simple title to Tracts Nos. 115, 200-2, 200-3, 203, 501, 603, 807, 1709, 1710, 2101, 3202-1, 3202-2, 3303,

3306, 3307-1, 3307-2, 3308, and 3309, subject, however, to existing easements for public roads and highways, public utilities, railroads, and pipelines.

(b) The perpetual right, power, privilege, and easement occasionally to overflow, flood, and submerge Tracts Nos. 115-E-2, 200-E-2, 200-E-3, 501-E, 603-E, 807-E, 1710-E, 2001-E, 2101-E-1, 2101-E-2, 3012-E, 3202-E-1, 3202-E-2, 3303-E, 3306-E-1, 3306-E-2, 3307-E-1, 3307-E-2, 3308-E-1, 3308-E-2, 3309-E-1, and 3309-E-2, and to maintain mosquito control in connection with the operation and maintenance of the Nolin Reservoir Project as authorized by the Act of Congress approved June 28, 1938 (Public Law 761—75th Congress), together with all right, title, and interest in and to the structures and improvements now situate on the land; provided that no structures for human habitation shall be constructed or maintained on the land, and provided further that no other structures shall be constructed or maintained on the land except as may be approved in writing by said representative of the United States in charge of the project; provided further that any exploration or exploitation of oil, gas and minerals shall be subject to Federal and State laws with respect to pollution and shall not create floatable debris; reserving, however, to the landowners, their heirs, and assigns, all such rights and privileges as may be used and enjoyed without interfering with or abridging the rights and easements hereby acquired; the above estate is taken subject to existing easements for public roads and highways, public utilities, railroads and pipelines.

(c) A perpetual and assignable easement and right of way, in, on, over and across Tract No. 603-E-2, for the location, construction, operation, maintenance, replacement, and/or removal of roads and highways and appurtenances thereto; together with the right to trim, cut, fell and remove underbrush, obstructions, and other vegetation, structures, or obstacles within the limits of the right of way; the above estate is taken subject to existing easements for public roads and highways, public utilities, railroads and pipelines.

5. The property so to be taken is described in the exhibit hereto attached.

6. The persons having or claiming an interest in the property (whose names are ascertainable by a reasonably diligent search of the records and those whose names have otherwise been learned) are:

Tract No.	Owners
115, 115-E-2	William R. Padgett and June E. Padgett, his wife 6908 Bedford Lane, Louisville, Kentucky
	Stanley Riley, Jr. and wife, if any 312 Browns Lane, Louisville, Kentucky
	Thomas E. Gates and Donna Kaye Gates, his wife 1634 Windsor Place, Louisville, Kentucky
	W. G. Reynolds Stonegate Road, Louisville, Kentucky
200-2, 200-E-2, 200-3, & 200-E-3	P. E. Frank and Maud F. Frank, his wife c/o Sinclair Oils, 600 Fifth Avenue, New York 20, New York
203	Brownsville Deposit Bank Brownsville, Kentucky
	William G. Reynolds and Mary N. Reynolds, his wife Stonegate Road, Louisville, Kentucky
	V. H. Logan and Terry Logan, his wife 30 E. 5th Street, Hinsdale, Illinois
	Ralph H. Logan and Catherine Logan, his wife 506 W. Jefferson, Louisville, Kentucky
	Leland H. Logan and Wilma D. Logan, his wife Bowling Green, Kentucky
	Ora E. Hazelip 615 Logan Street, Frankfort, Kentucky
501, 501-E	W. G. Reynolds and Mary Reynolds, his wife Stonegate Road, Louisville, Kentucky
	Unknown heirs of Cora B. Irvine
	Unknown heirs of James M. Perry
603, 603-E & 603-E-2	W. G. Reynolds and Mary Reynolds, his wife Stonegate Road, Louisville, Kentucky
	Koppers Company, Inc. 1550 Koppers Building, Pittsburgh 19, Penn.

Tract No.	Owners
807 and 807-E	W. G. Reynolds and Mary Reynolds, his wife Stonegate Road, Louisville, Kentucky
	Koppers Company, Inc. 1550 Koppers Building, Pittsburgh 19, Penn.
1709	Elmer L. Smith and Dolly Smith, his wife 4410 Park Boulevard, Louisville, Kentucky
1710 & 1710-E	Millie Bradley Wax, Kentucky
	Vera Johnston and Ewell Johnston, her husband Millerstown, Kentucky
	George Bradley and Catherine Bradley, his wife Wax, Kentucky
	Louise Bradley 1136 Forrest, Louisville, Kentucky
1710 & 1710-E	Bonetta Bradley Waddle and Everett Waddle, her husband Hardyville, Kentucky
	Wayne Bradley (minor) 1136 Forrest, Louisville, Kentucky
	Lush P. Powell Address unknown
	Mary J. Bradley Address unknown
	J. B. Pierce Address unknown
2001-E	Erick Meredith and Sissie Meredith, his wife Cub Run, Kentucky
	W. C. Gonterman Cub Run, Kentucky
	Gerstle Gonterman and Vernie Gonterman, his wife, Cub Run, Kentucky
	Eliza Logsdon and Delbert Logsdon, her husband, Upton, Kentucky
	Lillian Meredith and Alton Meredith, her husband, Mammoth Cave, Kentucky
	Delsie Taylor and Lloyd Taylor, her husband Mammoth Cave, Kentucky

Tract No.	Owners
	Grover Gonterman and Dorothy Gonterman, his wife, Mammoth Cave, Kentucky
	Myrtle McCubbage and Theodore McCubbage, her husband, Cub Run, Kentucky
	Susie Strader, widow Boston, Kentucky
	Warren Meredith, widower Cub Run, Kentucky
	Lee Holton and Willard Holton, her husband Cub Run, Kentucky
	Lue Barnes, widow Hart County, Kentucky
	Laura Bell Priddy 2124 North St., San Jose, California
2001-E	Ben Priddy 2124 North St., San Jose, California
	Arthur Priddy 2124 North St., San Jose, California
	Ollie Jorgenson and Claude Jorgenson, her husband 2124 North St., San Jose, California
	Elza Trulock and Ersa Woods Trulock, his wife Louisville, Kentucky
	Audry Wilson and Coy Wilson, her husband Greenwood, Indiana
2101, 2101-E-1 and 2101-E-2	George T. Logsdon and Ada M. Logsdon, his wife Cub Run, Kentucky
	Donnie Taylor and Harvey Taylor, her husband Cub Run, Kentucky
	Oddie Logsdon and Lloyd Logsdon, her husband Camner, Kentucky
	Nora Rigdon and Alfred Rigdon, her husband Horse Cave, Kentucky
	Mary Liza Thompson and Willard Thompson, her husband Cub Run, Kentucky
	Alven Bratcher and wife, if any Louisville, Kentucky
	Hart County Deposit Bank Munfordville, Kentucky

Tract No.	Owners
3012-E	Cody Thomas Alvey and Mary Jane Alvey, his wife Wax, Kentucky
3202-1, 3202-E-1, 3202-2, & 3202-E-2	Kermit Waddle and Leonora Waddle, his wife Cub Run, Kentucky
	Becky Logsdon and Phillip Logsdon, her husband Short Creek, Kentucky
3202-1, 3202-E-1, 3202-2, & 3202-E-2	William Blessitt and Mary L. Blessitt, his wife Clarkson, Kentucky
	Everett Grant R. R. No. 1, Clarkson, Kentucky
	Joseph C. Hays Address unknown
	J. E. Dennis Address unknown
	Hart County Deposit Bank Munfordville, Kentucky
3303 & 3303-E	Charlie Higdon and Ruby Higdon, his wife Cub Run, Kentucky
	Orvil Jones and Lizzie Jones, his wife Rt. No. 2, Mammoth Cave, Kentucky
	Willard Jones Rt. No. 2, Mammoth Cave, Kentucky
	Sam Jones and Gladys Jones, his wife Box 115, Schritz, Texas
	Alice Childress and Pete Childress, her husband Rt. No. 2, Park City, Kentucky
	Wid Thompson Indianapolis, Indiana
	Blanche Jaggers and Ernest Jaggers, her husband Rt. No. 2, Mammoth Cave, Kentucky
	Lillie Thompson and Thurman Thompson, her husband Rt. No. 1, Leitchfield, Kentucky
	Belle Gray and Claude Gray, her husband Copperas Cove, Texas
	Bessie Wright and Tommy Wright, her husband Louisville, Kentucky
	Ernest Thompson and Mageline Thompson, his wife Cub Run, Kentucky

Tract No.	Owners
3303 & 3303-E	John Ed. Thompson Cub Run, Kentucky
	Louise Thompson Address unknown
	F. L. Childress and Lizzie Childress, his wife Address unknown
	Hart County Deposit Bank Munfordville, Kentucky
3306, 3306-E-1, 3306-E-2	E. J. Dennis Cub Run, Kentucky
	Hart County Deposit Bank Munfordville, Kentucky
3307-1, 3307-E-1, 3307-2 and 3307-E-2	Virgil Dennis and Dacia Dennis, his wife Cub Run, Kentucky
	J. E. Dennis Address unknown
	Hart County Deposit Bank Munfordville, Kentucky
3308, 3308-E-1, 3308-E-2	Ernest Dennis and Opal Dennis, his wife Clarkson, Kentucky
	Hart County Deposit Bank Munfordville, Kentucky
3309, 3309-E-1, 3309-E-2	Virgil Dennis and Dacia Dennis, his wife Cub Run, Kentucky
	Leonard Houchen and ———— Houchen, his wife Address unknown

7. The Sheriffs and County Court Clerks of Edmonson and Hart Counties and the Taxing Authorities of the Commonwealth of Kentucky, may have or claim an interest in the property by reason of taxes and assessments due and exigible.

8. In addition to the persons named, there are or may be others who have or may claim some interest in the property to be taken whose names are unknown to the plaintiff and such persons are made parties to the action under the designation "Unknown Owners."

9. Contracts determining the amounts of just compensation payable by plaintiff have been entered into with the following named defendants:

Tract No.	Owners
115, 115E-2	William R. Padgett and June E. Padgett, his wife
	Stanley Riley, Jr.
	Thomas E. Gates and Donna Kaye Gates, his wife
200-2, 200E-2, 200-3, 200E-3	P. E. Frank and Maud F. Frank, his wife
1709	Elmer L. Smith and Dolly Smith, his wife
1710	Millie Bradley
	George Bradley and Catherine Bradley, his wife
	Vera Johnston and Ewell Johnston, her husband
	Bonetta Bradley Waddle and Everett Waddle, her husband
	Louise Bradley, widow
2001-E	Erick Meredith and Sissie Meredith, his wife
2101, 2101E-1 and 2101E-2	George T. Logsdon and Ada M. Logsdon, his wife
3012-E	Cody Thomas Alvey and Mary Jane Alvey, his wife

Wherefore the plaintiff demands judgment that the property be condemned and that just compensation for the taking be ascertained and awarded and for such other relief as may be lawful and proper.

Trial by jury of the issue of just compensation is demanded by plaintiff.

WILLIAM E. SCENT
William E. Scent
United States Attorney
211 Federal Building
Louisville, Kentucky

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY
AT BOWLING GREEN

Civil No. 857

UNITED STATES OF AMERICA, *Plaintiff*

v.

811.92 ACRES OF LAND, MORE OR LESS, SITUATE IN EDMONSON AND HART COUNTIES, STATE OF KENTUCKY, AND WILLIAM R. PADGETT ET AL., *Defendants*

Declaration of Taking

TO THE HONORABLE,
THE UNITED STATES DISTRICT COURT:

I, Elvis J. Stahr, Jr., Secretary of the Army of the United States, do hereby declare that:

1. (a) The land hereinafter described is taken under and in accordance with the Act of Congress approved February 26, 1931 (46 Stat. 1421, 40 U.S.C. 258a), and acts supplementary thereto and amendatory thereof, and under the further authority of the Acts of Congress approved April 24, 1888 (25 Stat. 94, 33 U.S.C. 591), and March 1, 1917 (39 Stat. 948, 33 U.S.C. 701), which acts authorize the acquisition of land for flood control projects; the Act of Congress approved June 28, 1938 (Public Law 761—75th Congress), which act authorized the construction of the Nolin Reservoir; and the Act of Congress approved September 30, 1961 (Public Law 87-330), which act appropriated funds for such purposes.

(b) The public uses for which said land is taken are as follows: The said land is necessary adequately to provide for a flood control project and for other uses incident thereto. The said land has been selected by me for acquisition by the United States for use in connection with the establishment of the Nolin Reservoir on the Nolin River in Kentucky and for such other uses as may be authorized by Congress or by Executive Order.

2. A general description of the land being taken is set forth in Schedule "A" attached hereto and made a part

hereof, and is a description of the same land described in the complaint in the above entitled cause.

3. The estates taken for said public uses are:

(a) The fee simple title to Tracts Nos. 115, 200-2, 200-3, 203, 501, 603, 807, 1709, 1710, 2101, 3202-1, 3202-2, 3303, 3306, 3307-1, 3307-2, 3308, and 3309, subject, however, to existing easements for public roads and highways, public utilities, railroads, and pipelines.

(b) The perpetual right, power, privilege, and easement occasionally to overflow, flood, and submerge Tracts Nos. 115-E-2, 200-E-2, 200-E-3, 501-E, 603-E, 807-E, 1710-E, 2001-E, 2101-E-1, 2101-E-2, 3012-E, 3202-E, 3202-E-1, 3202-E-2, 3303-E, 3306-E-1, 3307-E-1, 3307-E-2, 3308-E-1, 3308-E-2, 3309-E-1, and 3309-E-2, and to maintain mosquito control in connection with the operation and maintenance of the Nolin Reservoir Project as authorized by the Act of Congress approved June 28, 1938 (Public Law 761—75th Congress), together with all right, title, and interest in and to the structure and improvements now situate on the land; provided that no structures for human habitation shall be constructed or maintained on the land, and provided further that no other structures shall be constructed or maintained on the land except as may be approved in writing by said representative of the United States in charge of the project; provided further that any exploration or exploitation of oil, gas and minerals shall be subject to Federal and State laws with respect to pollution and shall not create floatable debris; reserving, however, to the landowners, their heirs, and assigns, all such rights and privileges as may be used and enjoyed without interfering with or abridging the rights and easements hereby acquired; the above estate is taken subject to existing easements for public roads and highways, public utilities, railroads and pipelines.

(c) A perpetual and assignable easement and right of way in, on, over and across Tract No. 603-E-2, for the location, construction, operation, maintenance, replacement, and/or removal of roads and highways and appurtenances thereto; together with the right to trim, cut, fell and remove underbrush, obstructions, and other vegetation, struc-

tures, or obstacles within the limits of the right of way; the above estate is taken subject to existing easements for public roads and highways, public utilities, railroads and pipelines.

4. Plans showing the land taken are annexed hereto as Schedule "B" and made a part hereof.

5. The sum estimated by me as just compensation for said land, with all buildings and improvements thereon and all appurtenances thereto, and including any and all interests hereby taken in said land, is set forth in Schedule "A" herein, which sum I cause to be deposited herewith in the registry of the said court for the use and benefit of the persons entitled thereto. I am of the opinion that the ultimate award for said land probably will be within any limits prescribed by law on the price to be paid therefor.

IN WITNESS WHEREOF, the United States of America, by its Secretary of the Army, thereunto authorized, has caused this declaration to be signed in its name by said Elvis J. Stahr, Jr., Secretary of the Army, this 12th day of March, A.D., 1962, in the City of Washington, District of Columbia.

ELVIS J. STAHR, JR.
Secretary of the Army

Schedule "A"

The land which is the subject matter of this proceeding aggregates 811.92 acres of land, more or less, situate and being in Edmonson and Hart Counties, State of Kentucky. A description of the lands taken, together with the names and addresses of purported owners thereof, and a statement of the sum estimated to be just compensation therefor, are as follows:

* * * *

TRACT NO. 203

Situate in the State of Kentucky, County of Edmonson, approximately 0.6 mile northwest of Cove Hollow Church, on the waters of Piney Branch, a tributary of Nolin River, and on the waters of Dry Prong of Piney Branch, more particularly described as follows:

Beginning at the northwest corner of the tract herein described, a point in the boundary between the lands now (or formerly) owned by Pate Motor Company and the lands of the subject owner, said point of beginning being in the U. S. Government fee taking line (N 344,635.71 E 1,860,994.93, Ky. State Grid System, south zone), and being referenced N 78° 06′ W 8.50 feet from a 5″ Hickory, N 21° 53′ W 10.80 feet from a 5″ Hickory, S 32° 43′ E 5.20 feet from a 6″ Hickory; thence leaving the U. S. Government fee taking line with the boundary between the lands of Pate Motor Company and the lands of the subject owner

N 40° 09′ E 490.00 feet, more or less, to a point in the center of Piney Branch and in said boundary; thence leaving Piney Branch with the boundary between the lands of Pate Motor Company, the lands now (or formerly) owned by W. E. Elmore, and the lands of the subject owner

N 40° 09′ E 726.00 feet, more or less, crossing Dry Prong of Piney Branch at approximately 610.00 feet, to a point in the boundary of the lands now (or formerly) owned by E. G. Parsley and a corner common to the lands of W. E. Elmore and the lands of the subject owner; thence with the boundary between the lands of E. G. Parsley and the lands of the subject owner

S 20° 12′ E 330.00 feet, more or less, crossing Dry Prong of Piney Branch at approximately 125.00 feet, to a point in the U. S. Government fee taking line and a corner common to said properties; thence with the U. S. Government fee taking line and said boundary

S 09° 29′ W 665.00 feet, to a point in the U.S. Government fee taking line in said boundary; thence leaving the U. S. Government fee taking line and continuing with said boundary

S 07° 33′ W 310.30 feet, more or less, to a point in the U. S. Government fee taking line in said boundary; thence with the U. S. Government fee taking line and said boundary

S 09° 29′ W 823.00 feet, to a point in the U. S. Government fee taking line and a corner common to the lands of E. G. Parsley, the lands now (or formerly) owned by P. E.

Frank, the lands now (or formerly) owned by Alva Lindsey, and the lands of the subject owner; thence with the U. S. Government fee taking line and the boundary between the lands of Alva Lindsey and the lands of the subject owner

S 73° 44′ W 271.50 feet, to a point in the U. S. Government fee taking line in the boundary of the subject owner and a corner common to the lands of Alva Lindsey and the lands now (or formerly) owned by Sarah Sailing; thence leaving the U. S. Government fee taking line with the boundary between the lands of Sarah Sailing and the lands of the subject owner

S 72° 49′ W 754.40 feet, more or less, crossing Piney Branch at approximately 430.00 feet, to a point in the U. S. Government fee taking line in the boundary between the lands of Sarah Sailing and the lands of the subject owner; thence with the U. S. Government fee taking line severing the lands of the subject owner as follows:

N 30° 40′ E 97.10 feet
N 08° 10′ W 320.00 feet
N 34° 10′ E 191.00 feet
N 04° 10′ E 316.00 feet
N 41° 10′ E 205.00 feet
N 15° 50′ E 329.00 feet

N 05° 10′ E 110.10 feet, to the beginning, containing 36.60 acres, more or less.

TRACT NO. 203 (Cont'd)

The above tract being a part of the same land as that described in a deed from Kentucky Rock Asphalt Company, a Delaware Corporation, to William G. Reynolds, dated 9 April 1959, recorded in Deed Book 58, page 392, in the records of Edmonson County, Brownsville, Kentucky.

NAME AND ADDRESS OF PURPORTED OWNER:

William G. Reynolds and Mary N. Reynolds, his wife
Stonegate Road
Louisville, Kentucky

NAMES AND ADDRESSES OF ADDITIONAL PARTIES HAVING OF CLAIMING AN INTEREST IN THE LAND:

M. M. Logan
address unknown
(Possible mineral interest)

Ira E. Hazelip
615 Logan Street
Frankfort, Kentucky
(Possible mineral interest)

All other persons who own or claim any interest in this tract, their successors and assigns, or if they be deceased, their unknown heirs, devisees administrators, executors, successors, assigns and creditors, if any.

ESTIMATED COMPENSATION: $926.00

• • • •

TRACTS NOS. 603, 603-E and 603-E-2

TRACT No. 603

Situate in the State of Kentucky, County of Edmonson, approximately 1.7 miles southeast of Moutardier, on the right bank of Nolin River, approximate river mile 14.6 and 17.0, more particularly described as follows:

Beginning at a point in the U. S. Government fee taking line, (Ky. State Grid System N 358,713.64 E 1,861,442.70, south zone), said point being referenced N 86° 31′ W 14.70 feet from a 6″ White Oak; N 77° 32′ E 31.00 feet from a 10″ White Oak; S 41° 35′ E 22.40 feet from a 4″ White Oak; said point of beginning being in the former boundary of Mary Green; thence with the U. S. Government fee taking line severing the lands of the subject owner as follows:

N 19° 28′ E 179.00 feet
N 18° 45′ E 490.00 feet
S 38° 08′ E 166.00 feet
S 70° 13′ E 199.00 feet
S 47° 41′ E 514.00 feet
N 44° 56′ E 399.00 feet
N 44° 26′ E 330.00 feet
N 14° 13′ W 344.00 feet
N 51° 53′ E 705.00 feet
N 61° 31′ E 288.00 feet
N 26° 42′ W 107.00 feet

N 39° 59′ W 481.00 feet, to a point in the U. S. Government fee taking line in the boundary between the lands of now (or formerly) Mary Duvall et al and subject owner; thence with the boundary between the lands of Mary Duvall et al and subject owner

S 87° 30′ E 400.00 feet, more or less, to a point in the center of Nolin River, in the boundary of now (or formerly) Fred Rich et ux and a corner common to the lands of Mary Duvall et al and subject owner; thence downstream with the boundary between the lands of Fred Rich et ux and the subject owner in the center of Nolin River as it meanders

Southeasterly and southwesterly 2,660.00 feet, more or less, to a point in the center of Nolin River in the boundary of Fred Rich et ux, being a corner common to now (or formerly) Mathew Newton et ux and subject owner; thence with the boundary between the lands of Mathew Newton et ux and subject owner

S 62° 50′ W 2,500.00 feet, more or less, to a corner common to said Newton property and subject owner; thence with a line of Mathew Newton et ux

S 42° 42′ E 2,400.00 feet, more or less, to a point in the center of Nolin River, being a point in the boundary of now (or formerly) Victor Decker, a corner common to Mathew Newton et ux and subject owner; thence with the boundary between the lands of Victor Decker and subject owner in the center of Nolin River downstream as it meanders.

Northwesterly 3,600.00 feet, more or less, to a point in the center of Nolin River, in a point in the boundary of Victor Decker and a corner common to the lands of now (or formerly) Amel Rich and subject owner; thence with the east boundary of the lands of Amel Rich and now (or formerly) George Fentress, Jr. et al, being the west boundary of subject owner

N 03° 20′ E 2,220.00 feet, more or less, to a corner common to the lands of now (or formerly) Alva Napper, George Fentress, Jr. et al and subject owner; thence with the south boundary of Alva Napper

N 75° 05′ E 190.00 feet, more or less, to a point in the center of Furnace Bluff Road, a corner common to the lands of Alva Napper and subject owner; thence with the lines of Alva Napper and subject owner in the center of Furnace Bluff Road

TRACT NO. 603(Cont'd)

N 53° 30′ W 250.00 feet
N 26° 00′ W 180.00 feet
N 29° 40′ W 245.00 feet

N 06° 30′ W 395.00 feet, to a point in the center of Furnace Bluff Road, being a point in the U. S. Government fee taking line; thence with the U. S. Government fee taking line, continuing with the boundary of Alva Napper and subject owner

N 00° 54′ W 353.00 feet, to a corner common to the lands of Alva Napper and subject owner; thence with the U. S. Government fee taking line and severing the lands of subject owner as follows:

S 79° 58′ E 1,798.90 feet
S 17° 36′ E 591.10 feet

S 33° 19′ E 939.00 feet to the beginning, containing 252.00 acres, more or less.

TRACT NO. 603-E

Situate in the State of Kentucky, County of Edmonson, approximately 1.7 miles southeast of Moutardier, on the right bank of Nolin River, approximate river mile 14.5 and 17.0, more particularly described as follows:

Beginning at a point in the U. S. Government fee taking line, (Ky. State Grid System N 358,713.64 E 1,861,442.70, south zone), said point being referenced N 86° 31′ W 14.70 feet from a 6″ White Oak; N 77° 32′ E 31.00 feet from a 10″ White Oak; S 41° 35′ E 22.40 feet from a 4″ White Oak; said point of beginning being in the former boundary of Mary Green; thence with the U. S. Government fee taking line severing the lands of the subject owner

N 33° 19′ W 123.00 feet, more or less, to the point where the 566 contour line crosses the U. S. Government fee taking line; thence upstream with the meanders of the 566 contour line severing the lands of the subject owner

Northeasterly 4,120.00 feet, more or less, to the point where the 566 contour line crosses the boundary between

the lands of now (or formerly) Mary Duvall et al and subject owner; thence with said boundary

S 87° 30′ E 71.00 feet, more or less, to a point in the U. S. Government fee taking line in said boundary; thence with the U. S. Government fee taking line severing the lands of the subject owner as follows:

S 39° 59′ E 481.00 feet
S 26° 42′ E 107.00 feet
S 61° 31′ W 288.00 feet
S 51° 53′ W 705.00 feet
S 14° 13′ E 344.00 feet
S 44° 26′ W 330.00 feet
S 44° 56′ W 399.00 feet
N 47° 41′ W 514.00 feet
N 70° 13′ W 199.00 feet
N 38° 08′ W 166.00 feet
S 18° 45′ W 490.00 feet

S 19° 28′ W 179.00 feet, to the beginning, containing 12.01 acres, more or less.

TRACT No. 603-E-2

Situate in the State of Kentucky, County of Edmonson, approximately 1.2 miles southeast of Moutardier, being a part of the proposed Furnace Bluff Road to Moutardier Launching Ramp as shown on Drawing No. 183-12.6/29 on file at the Office of the District Engineers, Corps of Engineers, Louisville, Kentucky District, more particularly described as follows:

Beginning at a point in the U. S. Government fee taking line, a point in the boundary between lands now or formerly owned by Alva Napper and the lands of subject owner, said point being referenced N 77° 36′ E 184.00 feet and N 0° 54′ E 330.00 feet from a point (Ky. State Grid System N 360,272.30 E 1,858,639.40 south zone); thence leaving the U. S. Government fee taking line and with the center line of existing Furnace Bluff Road, and the northeast boundary of said Napper property

N 67° 29′ W 197.00 feet to a point; said point being at center line Station 11+00 relocated Furnace Bluff Road to

Moutardier Launching Ramp; thence with said end of right-of-way, severing the lands of subject owner

N 12° 31′ E 50.00 feet to a point in the east right-of-way of proposed road, being 50.00 feet left of and normal to centerline Station 11+00; thence with said east right-of-way and the arc of a curve to the right (radius of 234.83 feet)

Southeastwardly 204.00 feet, more or less, to the point of beginning, containing 0.18 acre, more or less.

The above tracts being part of the same land as that described in a deed from Charles E. Whittle and his wife, Lillian Whittle to W. G. Reynolds, dated 3 October 1959, recorded in Deed Book 58, Page 550, and a deed from Charles E. Whittle and his wife, Lillian Whittle to W. G. Reynolds, dated 16 January 1960, recorded in Deed Book 59, Page 15, in the records of Edmonson County, Brownsville, Kentucky.

NAME AND ADDRESS OF PURPORTED OWNER:

W. G. Reynolds and Mary Reynolds, his wife
Stonegate Road
Louisville, Kentucky

NAMES AND ADDRESSES OF ADDITIONAL PARTIES HAVING OR CLAIMING AN INTEREST IN THE LAND:

Koppers Company, Inc.
1550 Koppers Building
Pittsburgh 19, Pennsylvania
(Minerals only)

All other persons who own or claim any interest in these tracts, their successors and assigns, or if they be deceased, their unknown heirs, devisees, administrators, executors, successors, assigns and creditors, if any.

ESTIMATED COMPENSATION: $14,200.00

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Schedule "B"

Schedule "B", consisting of maps indicating the project location and tracts taken, is omitted.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT BOWLING GREEN

Civil Action No. 857

Order

UNITED STATES OF AMERICA, *Plaintiff*,

v.

811.92 ACRES OF LAND, more or less, situate in Edmonson and Hart Counties, State of Kentucky, and William R. Padgett, et al., *Defendants*.

Upon consideration of plaintiff's motion, by counsel, to file a Declaration of Taking, which Declaration of Taking is signed by the Honorable Elvis J. Stahr, jr., Secretary of the Army of the United States, and the Court being sufficiently advised,

IT IS ORDERED that said declaration of taking be and it is hereby filed.

Entered this 17th day of April, 1962.

/s/ MAC SWINFORD
Judge, U. S. District Court
Western District of Kentucky

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT BOWLING GREEN

Civil Action No. 857

Order for Delivery of Possession

UNITED STATES OF AMERICA, *Plaintiff*,

v.

811.92 ACRES OF LAND, more or less, situate in Edmonson and Hart Counties, State of Kentucky, and William R. Padgett, et al., *Defendants*.

This action coming on for hearing upon motion of plaintiff for an order for the surrender possession of the property described in the complaint filed herein to plaintiff, and it appearing that plaintiff is entitled to possession of the said property,

It is this 17th day of April, 1962, adjudged that all defendants to this action and all persons in possession or control of the property described in the complaint filed herein shall surrender possession of the said property, to the extent of the estate being condemned to plaintiff immediately; provided that a copy of this order shall be served upon all persons in possession or control of the said property forthwith.

/s/ MAC SWINFORD
Judge, U. S. District Court

Entered 4-18-62

Answer and Notice of Appearance of W. G. Reynolds—Filed May 18, 1962.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT BOWLING GREEN

Civil No. 857

UNITED STATES OF AMERICA, *Plaintiff*,

v.

811.92 ACRES OF LAND, more or less, situate in Edmonson and Hart Counties, State of Kentucky, and William R. Padgett, et al., *Defendants*.

Comes the Defendant, W. G. Reynolds, by counsel, and for his Answer and Notice of Appearance in the above styled action, states as follows:

Defendant claims a mineral interest, or fee simple interest, in and to all or a portion of the following properties (reference hereafter will be to Tract Numbers as set forth in the Complaint and Notice):

(1) Tract No. 115—Mineral Fee
(2) Tract No. 115-E-2—Mineral Fee
(3) Tract No. 203—Fee Simple interest
(4) Tract No. 501—Fee Simple interest
(5) Tract No. 501-E—Fee Simple interest
(6) Tract No. 603—Fee Simple interest
(7) Tract No. 603-E—Fee Simple interest
(8) Tract No. 603-E-2—Fee Simple interest
(9) Tract No. 807—Fee Simple interest
(10) Tract No. 807-E—Fee Simple interest

Defendant further demands full and just compensation for his interest which has been taken in this proceeding as it may appear and for any other relief to which he may appear entitled.

GORDON B. DAVIDSON,
H. WENDELL CHERRY.

Answer and Notice of Appearance of Mary N. Reynolds—Filed March 16, 1966.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT BOWLING GREEN

Civil No. 857

UNITED STATES OF AMERICA, *Plaintiff*,

v.

811.92 ACRES OF LAND, more or less, situate in Edmonson and Hart Counties, State of Kentucky, and William R. Padgett, et al., *Defendants*.

Comes the Defendant, Mary N. Reynolds, by counsel, and for her Answer and Notice of Appearance in the above styled action, states as follows:

Defendant claims a fee simple title and/or fee mineral interest in the Tracts set forth in this Action, as described in the Notice filed by the Plaintiff.

Defendant demands full and just compensation for her interest which has been taken in this proceeding, as it may appear, and for any other relief to which she may appear entitled.

J. DAVID FRANCIS,
GORDON B. DAVIDSON,
H. WENDELL CHERRY.

COLLOQUY

[1] (Reporter's note: On May 18, 1967, Civil No. 857, United States of America v. 811.92 Acres of Land, more or less, situated in Edmonson and Hart Counties, State of Kentucky, and William R. Padgett, et al, was called for trial, the parties were represented in person or by counsel, and the following occurred:)

The Court: Now, there is a preliminary motion to be taken up before we go into the trial.

Mr. Rivers: Yes, sir. It has been briefed on both sides. I think my brief sets out the facts all the way through as to how this—

The Court: I would like to hear you on that before we go into this, see what you have to say about it.

Let me have the record, please, Mrs. Harris.

Mr. Rivers: Your Honor, this case involves a declaration of taking of land for the Nolin Reservoir, involving two tracts in the same ownership, 603, E and E-2, and Tract 203. Now, both of these tracts as taken, Tract 203, all the land taken will be inundated by the Nolin Reservoir; Tract 603, part of it was taken in fee and easement and will be inundated, and the remainder was taken for public use or access area.

[2] The question involved is whether since the reservoir went in, these landowners are entitled to have this land valued as enhanced by this project or without enhancement.

The Court: Now, I might state to you I was not aware that there was any pending motion in this case.

Mr. Rivers: Sir, these were filed back when Judge Gordon and Judge Brooks came down last summer.

The Court: Well, I have had no notice of it whatsoever.

Mr. Rivers: Judge Brooks heard a companion case, the case to be tried tomorrow, of Jones.

The Court: I don't want you to be misled in any way. I knew nothing about it and have had no knowledge of it. If you want to argue your motion now I will be glad to listen to you or if you want me to read these briefs now and pass on this question in the morning, I will try to do it, but I have had no knowledge of it whatsoever.

Mr. Rivers: Well, Your Honor, I will agree, if they will stipulate the facts that I have set out in my brief, to have it submitted and let you [3] read the briefs tonight.

Mr. Solomon: If Your Honor please, I would like to—

The Court: I am sorry, but it has just never been brought to my attention. Now, the other judges were here and I suppose they had it up before them, but I have no knowledge of it at all.

Mr. Rivers: Judge Brooks got sick just before this one was to be heard.

Mr. Solomon: If Your Honor please, could we make some remarks and then you read the briefs tonight?

The Court: Yes, sir. I would be glad to have you do that.

(Reporter's note: Oral arguments were made by counsel on both sides in support of their respective positions. A jury was regularly impaneled and accepted by both parties.)

The Court: This jury has been selected. It is time for recess until tomorrow morning at 9 o'clock. This jury will not be sworn until we are ready to proceed with the trial. I want you to come back here tomorrow morning at 9 o'clock and try the case.

[4] During the recess do not discuss this case among yourselves. Do not permit anyone to discuss it with you or in your presence or make up your minds about it in any way until it is finally submitted to you. Don't talk to members of your family, those of you who go home. Don't discuss it with anyone. In other words, just dismiss it from your mind until we reassemble here tomorrow to proceed with the trial.

I know there is a temptation to talk to members of your family. Court is interesting whether we like it or not, it is one of the big items of interest all the time and people want to know what is going on in court, and after you are off of the jury you can talk about it as much as you please, but I will have to ask you to observe this admonition both in the letter and in the spirit and do not talk to members of your family or anyone else about these cases.

I am sure you would like to be treated the same way if you had your property and if you were represented by the government and would not want jurors discussing questions for decision with some outsiders.

All other jurors, those not engaged in the trial of the case, may be excused until [5] 9 o'clock Monday morning. Go and come back at 9 o'clock next Monday morning.

The jury in the box will be back in the morning at 9 o'clock. Now, let's don't have any confusion. I don't want this jury to come back Monday and the others in the morning.

After the jury has retired, Mr. Marshal, you may announce a recess until 9 o'clock. (Reporter's note: The

court recessed until 9 a.m., the following day, May 19, 1967, at which time the parties were represented in person or by counsel, the jury was present, and the following occurred at the bench in the immediate presence of counsel and the Court, out of the hearing of the jury:)

The Court: Now, gentlemen, I have read all these cases and done some research on my own. As a matter of fact, I had a considerable memorandum on this same question. It seems to me that this question is governed entirely by the Miller case. I don't have any way to Shepherdize it.

Mr. Rivers: That has never been overruled.

The Court: It is a 1943 case, an old case, and there has been a lot of condemnation since [6] then and it comes down to this rule as I understand it, which is the instruction which was approved by the Supreme Court:

"If in the instant case the respondents' lands were at the date of the authorizing Act, clearly within the confines of the project, the respondents were entitled to no enhancement in value due to the fact that their lands would be taken. If they were within the area where they were likely to be taken for the project, but might not be, the owners were not entitled, if they were ultimately taken, to an increment of value calculated on the theory that if they had not been taken they would have been more valuable by reason of their proximity to the land taken. In so charging the jury the trial court was correct.

"The respondents assert that a different rule should have been applied in respect to severance damage, even if the court's ruling were correct as to the valuation of land taken. In the light of what has already been said, we find no merit in the contention.

[7] Now, I have written down here—your case here is a good case, it is United States of America v. 172.80 Acres of Land, 350 F.2d 957. That was decided in '65 and it says this:

"In sum, a purchaser contemplating the acquisition and private development of the Totten property after the 1959 initiation of the reservoir project could reasonably anticipate that he would be able to devote the land to its highest economic use, enjoying advantages inherent in the

proximity of the nearby government development without serious apprehension that his land would soon be condemned. Thus, enhancement of value during this period was properly included in the subsequent condemnation award. Cf. Scott v. United States, 5th Cir. 1944, 146 F. 2d 131; Blas v. United States, 9th Cir. 1958, 261 F. 2d 636."

And this is from the Miller case:

"There is, however, another possible element of market value, which is the bone of contention here. Should the owner have the benefit of any increment of value added to the property [8] taken by the actual public authority in previously condemning adjacent land? If so, were the lands in question so situated as to entitle respondents to the benefit of this increment?

"If a distinct tract is condemned, in whole or in part, other lands in the neighborhood may increase in market value due to the proximity of the public improvement erected on the land taken. Should the Government at a later date, determine to take these other lands, it must pay their market value as enhanced by this factor of proximity. If, however, the public project from the beginning included the taking of certain tracts but only one of them is taken in the first instance, the owner of the other tracts should not be allowed an increased value for his lands which are ultimately to be taken any more than the owner of the tract first condemned is entitled to be allowed an increased market value because adjacent lands not immediately taken increased in value due to the projected improvement.

[9] "The question then is whether the respondents' lands were probably within the scope of the project from the time the Government was committed to it. If they were not, but were merely adjacent lands, the subsequent enlargement of the project to include them ought not to deprive the respondents of the value added in the meantime by the proximity of the improvement. If, on the other hand, they were, the Government ought not to pay any increase in value arising from the known fact that the lands probably would be condemned. The owners ought not to gain by speculating on probable increase in value due to the Government's activities."

Now, it is difficult in the light of these things that I have read here—your other cases I think cover the same thing in more or less different tone—but the difficulty comes in applying these things.

This land was taken on the 18th of April 1962, wasn't it?

Mr. Solomon: Yes, sir.

The Court: And I have drawn this [10] statement of my own here: "If the land is within the area to be taken"—now that not only means was actually taken, but was probable to be taken—it is a vague sort of fluid thing—"no enhancement in value by reason of the proximity. If it was not contemplated to be taken in the original taking, owner has a right to enhanced value by reason of the proximity to development."

Mr. Solomon: As of the date of taking, 1962.

The Court: Now, what do you say to that? I'm trying to do something here to be able to—

Mr. Rivers: I say this, if we can put on our proof as to how this project developed, I think it ought to be decided by the Court rather than a jury.

The Court: I think so, too.

Mr. Rivers: This project was seventy-three per cent completed when this was condemned. This was condemned for the reservoir proper and access area. The only problem we have ever had in the three districts, like the Crance case says, after the lines are finalized where you go down and complete a project, then you come back and start buying recreation or public access areas. This one didn't work this way. They went [11] right down the river. You have got to condemn the first tracts for the dam, then you go down the river and you can't say, "This tract here wasn't, they should be entitled to enhancement", when the first one was not.

The Court: That was in 1958 when the project was first laid out, wasn't it?

Mr. Rivers: '59 is when we first started construction.

The Court: I know, but it was all made public. They go into all that in these cases. So I am going to hold this, that under the circumstances here it was clearly the intention of the government to take these lands that were adjacent to the dam and on up, so far as the reservoir might reasonably be anticipated to cover the lands. Now then,

if at a later time they decided to enlarge on that, entirely new thought—it is difficult to get at, it is difficult to know how to do it—they decided to go on out here and take in something else to make a park or something out of it, they would be entitled to the enhancement, if it was a new thought, so to speak.

Mr. Rivers: The regulations provide, the Corps regulations, every place, every dam has to have use and access areas.

[12] The Court: I know, including the use and access areas.

Mr. Solomon: It may not have been this place.

The Court: I can't get around this language in the Miller case. I don't know how I'm going to do about it. It says here:

"The question then is whether the respondents' lands were probably within the scope of the project from the time the Government was committed to it."

I will just have to decide that from what your proof is.

Mr. Rivers: Well, I will put him on.

The Court: That is all I can do.

Mr. Solomon: I have a 1966 case I have here.

The Court: Not a Supreme Court case?

Mr. Solomon: No, sir.

The Court: Well, this case covers it.

Mr. Solomon: I agree the Miller [13] case is controlling.

The Court: The Miller case is controlling. "If they were not, but were merely adjacent lands", and if they were not probably within the scope of the project, to paraphrase that.

Mr. Solomon: I agree with your statement, Judge. I think that is the law.

The Court: "If they were not, but were merely adjacent lands, the subsequent enlargement of the project to include them ought not to deprive the respondents of the value added in the meantime by the proximity of the improvement."

Now, I'm going by the Miller case and I will consider your application of it and try to work it out. That is all I know. It's going to be difficult. Maybe it won't be quite

as difficult when we get into it, as it appears now, trying to project this thing, but we will just have to start. I think I'm bound by the Miller case.

Mr. Rivers: Can we have this witness' testimony given out of the presence of the jury?

The Court: Well, I don't know what you mean exactly, because it may be that I will admit all of it. I don't know.

[14] Mr. Rivers: Your Honor, here is the way it goes. They have got the burden, they go first, but I would like to get this witness on and decide this.

The Court: You mean their witness?

Mr. Rivers: No, our witness—planning of the project, how it all developed, and get this ruling before it goes to the jury.

Mr. Solomon: I don't think it can be done. It is a factual situation applied to the law here.

Mr. Rivers: Nobody else can testify to it.

The Court: If you have a witness that is going to testify just what this project was,—

Mr. Rivers: That's what I've got.

The Court: —I will admit it. I will admit that in evidence.

Mr. Rivers: But the proof goes in, Your Honor, they are going in on enhanced. We think after the facts are introduced they won't go in on enhancement.

The Court: On your statement that you are going to prove what this project is, you are making a professional statement and commitment to me that you are going to prove that this land in question [15] was all in contemplation,—

Mr. Rivers: Yes, sir.

The Court: —I am going to sustain you on it. That is all I have got unless they have some way to rebut it.

Mr. Solomon: If Your Honor pleases, may I get this clear?

The Court: Yes, sir.

Mr. Solomon: Is the District Attorney stating that he is stipulating that he has proof that on April the 18th, 1962, they contemplated taking the additional area? We admit this, that they contemplated on April the 18th, 1962, but the land was purchased in '59 and '60.

The Court: Well, don't you think—

Mr. Rivers: The dam started in '59.

The Court: Don't you think the whole thing comes out of the question of what was contemplated in 1959?

Mr. Solomon: Yes, sir.

Mr. Rivers: It was probably to be taken.

Mr. Francis: What our proof will be along this line, they started building this dam in 1959; [16] Mr. Reynolds' agent, Mr. Moody, who is here today, will testify being over there with the colonel, whose name I can't recall, but of course he can, with the Corps, the Corps of Engineers—General Albert Nosan—just looking at the lake; he took him out and showed him this site; he said, "Here's where we are getting ready to plan a development." He said, "Well, I think you're right. I think it is the prettiest site on the lake. I'm going to condemn it and take it for public use."

The Court: You mean afterwards?

Mr. Francis: Just before April 1962. In other words, I offer that.

The Court: Well, I don't know that the government would be bound by the statement of some one person. That is a little too—I think you're going to have to go on the basis—

Mr. Francis: The point I was trying to make that even at that time this was not in the contemplation of taking.

The Court: But whether or not you can establish it by that fact, I don't think you can, even if he did say it, maybe two of them said it, I don't think that would bind the government on the thing. You conceivably could have the one whose decision was [17] ultimate, which would be the Secretary of Interior, I suppose, to say that he had no interest in it up until that time, that might be proof, but not just some engineer who walks around on Sunday afternoon—

Mr. Francis: This is a general.

The Court: I know, they are all generals.

Mr. Francis: I mean it wasn't just a Corps of Engineers employee.

The Court: There is no use getting an error in here some way, we ought to work out some plan of attack. These things are troublesome.

Mr. Solomon: Is the Court ruling, on April the 18th, 962, the date of taking, what would be the value of the and? The lake was already known at that time, already here, so there would be an enhanced value just by the ery nature of the date of taking.

The Court: But if that land was in contemplation of he lake being taken by the government, back in '58 or '59, hen it is not subject to the enhancement.

Mr. Solomon: I think that would be up to them to prove hat they were going to take this particular spot as a recreational area and I think that [17-A] is just as I have written here and I am willing to be bound by that.

The Court: That is what I deduct from the Miller case.

Mr. Solomon: Yes, sir.

The Court: Now, what do you want to do?

Mr. Rivers: To keep any error from getting in this case, Your Honor, I think I ought to put this witness on from the Corps of Engineers, get that evidence in, and then you can rule on it.

Mr. Francis: What is his name?

Mr. Rivers: Max Bohrer.

Mr. Francis: Was he on the list of witnesses?

Mr. Rivers: I doubt it.

Mr. Francis: Your Honor, we are under an order of court to exchange witnesses and he is not on this list. I think we ought to try it—

Mr. Rivers: Now, hold off. That was to be a hearing before we went to trial, under Judge Brooks' order.

The Court: Well, I'm going to let you offer your witness. Do you want to offer him out of [18] the hearing of the jury?

Mr. Rivers: Yes, sir.

The Court: I am going to let you offer him. I think it is in the interest of getting at this thing best.

(Thereupon the Colloquy at the Bench Ended)

The Court: The jury has not yet been sworn. Members of the jury, I am going to have to exclude you from the courtroom. There is some evidence that will have to be heard in your absence. It will just take a few minutes and

I will not swear the jury until we are ready to begin the trial.

Let the jury retire from the courtroom. Go to the jury room and remain until the Court calls you back. Bear in mind all admonitions, members of the jury. Don't discuss the case.

(Reporter's note: The jury withdrew from the courtroom and the following occurred in the absence of the jury:)

The Court: Call your witness.

Mr. Rivers: Max Bohrer.

• • • • • • • • • • •

[19] (Reporter's note: The following testimony was offered out of the presence of the jury:)

MAX BOHRER

being called as a witness in behalf of the government, first being duly sworn, testified as follows:

Direct Examination

By Mr. Ernest W. Rivers
United States Attorney

Q. State your name please. A. Max Bohrer.

Q. By whom are you employed, sir? A. Corps of Engineers, at Louisville.

Q. How long have you been with the Corps of Engineers? A. Twenty-four years.

Q. And what is your present position with the Corps of Engineers? A. I am Assistant Chief of Real Estate Division, in the District Office.

Q. Now, in that division, do your duties include in any way the acquisition of land for various projects by the Corps? A. Yes, sir.

[20] Q. Now, you are familiar with the Nolin project? A. Yes, sir.

Q. When was that project authorized by Congress? A. May I refer to my notes?

Q. Yes, sir. A. The Nolin Reservoir project was authorized by the Flood Control Act approved 28 June 1938.

Q. Now, do you know when Congress first appropriated money for the acquisition and construction of this project?

A. Well, the first money appropriated for this project was for planning purposes, on the 20th day of July 1956; on the 12th day of October 1958, Congress made construction funds available to start the project.

The Court: What date was that?

The Witness: The 12th day of October 1958.

Q. Now, what is the policy of the Corps of Engineers with reference to access use areas in projects at this time—at that time what was the policy? [21] A. Well, of course, when we get planning money within the Corps of Engineers, we prepare what is called a General Design Memorandum and in the General Design Memorandum we cover all phases of the project, that it, all construction features, including the land acquisition. Now, the land acquisition portion of this report, of course, is general in nature and then later on we prepare what are called Detailed Real Estate Design Memorandums, which are based on actual surveys of the land.

Q. Now, when was construction started on this project? A. Construction was started in January 1959.

Q. Now, do the regulations of the Corps of Engineers make any provision for public use and access areas on these particular type projects? A. Well, in the General Design Memorandum, which was approved by the Chief of Engineers in Washington, on the 14th day of July 1958, the General Design Memorandum contemplated the acquisition of land and the construction of appropriate access facilities around the reservoir.

Q. Now, that was in the preliminary stages? [22] A. That was in the preliminary stages. Then later on in our planning—you see, planning on a project runs from the beginning to the end of construction. In other words, we never really get through with planning. This is sort of like building a house. We make changes as we go along. And so later on the Corps prepared what is called a Preliminary Master Plan and the Preliminary Master Plan, of course, covers the recreational aspects of the project. Now, this Preliminary Master Plan was prepared and submitted to Washington for approval and was approved by the Chief of Engineers on the first day of October 1959 and this memorandum covered, of course, the access points then as they were constructed.

Q. Was Tract 603 included in that Design Memorandum? A. Tract 603 is a part of what we know as Access Area No. 7 and was approved in this Design Memorandum.

Q. Now, do you know when this was submitted for approval by the District Engineer at Louisville, when it was sent in for approval, that date? A. Design Memorandum No. 8, [23] which covers the Preliminary Master Plan was submitted to the Division Engineer at Cincinnati on the 2nd day of March 1959.

Q. Now, how long does it take to prepare a Design Memorandum like that, sir? A. Well, of course, as I said before, our planning started back with the General Design Memorandum, which was in July of '58 and, of course, this was submitted the 2nd of March '59 and then required certain modifications that were suggested by the Division Engineer and the Chief of Engineers in Washington, and then was finally approved then the 1st day of October 1959.

Q. As of March 1959, approximately how many months would it have taken to prepare this Design Memorandum? A. A couple of years.

Q. A couple of years? A. A couple of years.

Q. And this Tract 603, was it contemplated to be taken as part of the project, as part of the access area during this planning stage? A. The first plan that was [24] submitted did not include Site 7, but before the plan was approved it did include Site 7, after all the planning was completed.

The Court: And when was it approved?

The Witness: The 1st day of October 1959.

Mr. Rivers: It was submitted as of March 2nd, 1959, though, Your Honor.

Q. Now, what do your regulations provide with reference to access and use areas along a project of this type? At that time what did it provide? A. Well, of course, our regulations require that we provide for the general public, certain public use areas around the reservoir, of sufficient acreage to accommodate the public on a studied or projected basis, maybe up to the year 2000, and depending on the location of the site would depend on the size. Now, Access Site No. 7 happens to be a very—was determined to be a major site for recreation.

Q. Now, part of Tract 603, will it be inundated by the project or is it? A. Most of the tract would be [25] inundated by the reservoir. Only about—according to our figures here, about 78 acres would be above the flood control pool.

Q. In other words, part of the Tract 603 was taken for the reservoir? A. The major portion was taken for the reservoir proper.

Mr. Rivers: I believe that is all, Your Honor.

The Court: Do you want to cross-examine him, Mr. Solomon?

Mr. Solomon: Yes.

Cross Examination

By Mr. Erwin S. Solomon
Counsel for the Landowner

Q. Mr. Bohrer, you gave certain dates here. Let's see if I have them correct. October the 1st, 1959, by Fifth Indorsement, if you refer to your notes, by the Chief Engineer, covered certain easements, is that correct—603, E-2, that has to do with this project? A. No, sir. The approval date I gave you is 1 October, covers the Preliminary Master Plan.

[26] Q. For 603? A. Yes.

Q. All right. Does that include 603, E-2? A. Well, E-2—

Q. The easement. A. —E-2 is a flowage easement which is covered in what we call a Real Estate Design Memorandum, and I haven't given you that. That Real Estate Design Memorandum offered by OCE on the 9th day of September 1960.

Q. That's right, 1960. Now, 603, E-2, what does that—what is that and where is it located? A. 603, E-2, is a road right-of-way easement consisting of .18 of an acre.

Q. Where does it go? A. It comes off of the—a road leading into Access Site No. 7.

Q. In other words, this is the road that goes through the portion of 603 that is not going to be inundated? A. This is just a part of the road, yes, that adjoins the 78 acres that is above the [27] flood control pool.

Q. And that was not acquired, approved for acquisition, until September 9th, 1960? A. That's right.

Q. Which is a little more than a year after the indorsement of October 1st, '59, of 603, is that correct? A. Yes, sir.

Q. Now, when did Congress appropriate the money for this purchase? A. Well, of course, our money for acquisition of lands is included in the construction funds and construction funds were first made available by the Congress on the 12th day of October 1958.

Q. No, but I'm asking for this tract, 603. A. Well, I don't know whether I would be able to answer that because our construction money then usually follows in sequence, in subsequent years, so that would be depending on how we develop our planning in the office as to when we acquire a tract.

Q. Isn't it true that money was not appropriated to acquire this tract until September 1961? [28] A. I wouldn't say that. The money was—

Q. It is in the pleadings. A. The money was available on the 12th day of October 1958, to acquire this tract if we had had approval to acquire it and that approval to acquire it was established as of the 1st day of October 1959.

Q. The pleadings speak for themselves and it states in the pleadings that Congress appropriated money for 603 in September of 1961. I'm not going to belabor the point. A. I think I can clear that for you, sir. This is probably a recitation in the declaration of taking and what we do is take the last appropriation act because our money follows in sequence as I said before. In other words, in your citation of the declaration of taking we always take the current appropriation act.

Q. Sir, in page one, complaint in condemnation, Civil Action 857, it states: "The authority for the taking is the Act of Congress approved February 26, 1931, and acts supplementary thereto and amendatory thereof, and under the further authority of the [29] "Acts of Congress approved April 24, 1888, and March 1, 1917, which acts authorize the acquisition of land for flood control projects; the Act of Congress approved June 28, 1938, which act authorized the construction of the Nolin Reservoir; and the Act of Congress approved September 30, 1961 (Public Law 87-330), which act appropriated funds

for such purposes." A. Well, sir, if I might explain, construction money made available for land acquisition on Nolin started, as I said before, on the 12th day of October 1958, and we completed acquisition in December 1963, and this covered several appropriation acts of the Congress and depending on the sequence of acquisition would depend on what we cite in the declaration of taking, it has nothing to do whatsoever with when we get it. The money is there from the 12th day of October 1958.

Q. Then what did the Congress appropriate on September 30th, 1961? For what reason was that money used? A. Additional construction money.

Q. For Tract 603? A. Not necessarily.

Q. But it could have been? A. Could have been, just like for any other tract.

[30] Q. Well, you don't know that. All right, then you made the statement that the original planning did not include Site 7, isn't that correct? A. The first summation—

Q. This Site 7, for the clarification of the record, is Tract 603, that portion of 603 approximately 78 acres, which was not covered by floodage, that's correct, sir. A. When we first submitted the preliminary master plan, it did not include Site 7. Site 7 was selected as a public use area on the 17th day of June 1959 and was incorporated then into Design Memorandum No. 8, which was approved on the 1st day of October 1959.

Q. Now, what advice did you give landowners, or do you know, that this site was to be taken? A. Well, I don't know as we gave them any particular advice. You see, when we acquire land in the reservoir we usually start at the dam and work upstream. Now, depending on our construction schedules, we may, what we call "leap-frog" to an access area because of construction, in other words, to buy that area before we buy land downstream from it.

Q. In this case you didn't take 603 until April 18, 1962, isn't that correct? [31] A. I don't have that date here. I presume that is the date when the declaration of taking—

The Court: That is the declaration of taking?

A. —when the declaration was filed. However, I might add that we opened negotiations, I am sure, considerably

before that date, before the declaration of taking was filed.

Q. I am not saying what you always do. Do you know in this particular project that was done? A. Yes, because I read the negotiator's report.

Q. What date was on it? A. I don't remember the date.

Q. Do you have it with you?

The Court: Do you have the date, Mr. Rivers?

(Reporter's note: A document was given to the witness.)

Mr. Francis: May we take a look at that, please.

The Witness: Certainly.

(Reporter's note: The document was given to the counsel for the landowner.)

[32] Q. Do you have the date here of March the 31st, 1961? A. I am reading now from the negotiator's report on Tract 603 and I observe that the first contact here was the 13th day of March 1961.

Q. Correct. And this land was acquired by the landowner on what date? A. I don't know that.

Q. It was prior to the first negotiation, isn't that correct? A. I don't know that. I know the land was approved for acquisition before this date. It was approved for acquisition on the 1st day of October 1959.

Q. I know you're getting back to that, but let's try to be fair about this thing. My question is, did you have any knowledge, representing the Corps of Engineers, that the plans to acquire this recreational area known as Site 7 was disclosed to the public in any way or to the landowner, prior to the date of March 31st, 1961? A. Well, of course, because this land is adjacent to the reservoir, it is in the category of what I would call likely to be taken for the project. [33] As I said before, the planning goes on from the beginning to the end of this project and all land that is adjoining the reservoir or in the immediate vicinity thereof is susceptible to acquisition by the government until the project is completed.

Q. How many miles is there around this lake? A. I don't know how many miles around the lake but it covers about 23 square miles in area.

Q. The lake itself? A. Yes.

Q. What about the shore line? That is what we're talking about. That is where your recreational area would be, isn't that correct? A. Yes, of course, the recreational areas don't encompass all the shore line. They are at selected points.

Q. Of course, but you could have gone, theoretically, to any point along the shore line to acquire it? A. Theoretically.

Q. But you did acquire eight places, is that correct? [34] A. Theoretically, we could have acquired access points at any place around the reservoir, yes, sir.

Q. So it would not be known to the general public which place that you were going to put your eight sites, isn't that correct? A. Well, our engineers, of course, determined that and as I said, they could have determined that the access areas could have been located at any point around the lake.

Q. Exactly right. A. Yes.

Q. And according to your testimony then the public—you don't know of any knowledge that was given to the public on October—or the landowner—October 1st, 1959? A. Not in specific, but, of course, the people in the area knew we were buying land in the area, they knew the reservoir was under construction,—

Q. Of course they did. A. —and any landowner adjoining the reservoir knew that his land might be taken for the reservoir.

Q. Did you put any—do you know [35] if the Corps put out any pamphlets or, as in cases of other dams, hold public meetings to find out where the public would like these sites to be, so that there would be a disclosure? Was this done in this project? A. Well, we held public hearings on this project. I don't recall just exactly when, but that is our policy, of course, to hold public hearings.

Q. Well, you are making a statement they did. When and where? A. I don't know.

Q. You don't know if it was after '59, before '59 or any time? A. Oh, it was before '59.

Q. That you held public hearings about where the recreational sites would be? A. Generally, we don't get into

the specifics on this project. As I said, the planning goes from the alpha to the omega. We don't stop the planning.

Q. I'm not talking about alpha to omega. I'm talking about Site No. 7 and the other sites. Did you hold a public hearing or do you know of anybody in the Corps of Engineers that held a public meeting prior to October 1st, 1959, to disclose where [36] these sites would be or ask advice— A. We held a public hearing and the General Design Memorandum or the general plan of the reservoir included public access sites.

Q. And did that include Site No. 7? A. Probably didn't.

Q. Probably didn't? A. Probably didn't because the Site 7, as I said before, was incorporated in the plan on the 17th day of June 1959.

Q. So, it wasn't disclosed to the public, Site No. 7, according to your statement probably not? A. You see, this is just like our land acquisition, we don't know in detail what lands will be required in the reservoir until we get it planned. So this is part of the planning that goes on.

Q. Right. Now, isn't it true that the Corps of Engineers wrote a letter to Judge Lindsey on August 22, 1962, signed by Fred Morgan, Chief of Real Estate Division, asking at that time and informing him of the completion in 1963 and asking him at that time about the access sites? [37] A. I am not familiar with it.

Mr. Rivers: May we see it?

Mr. Solomon: Sure. (Handing document to counsel for the government).

Q. You can't know of all the correspondence that went on or what was done. You are not claiming you do, do you? A. Well, of course, Mr. Morgan is the chief of our division, who signed that letter, and I sit pretty close to him and I see probably the majority of the correspondence that goes out of our division.

Q. Well, let me ask you if you have seen—have you any objection?

Mr. Rivers: Huh-uh.

(Reporter's note: The document was given to the witness.)

A. Well, this letter, of course, concerns the out-leasing or licensing of public—or the access areas for public recreation and it is addressed to the Honorable George

Lindsey, Judge of the Edmonson County Court, Brownsville, Kentucky, as an interested party to that extent.

Q. Right. Did you have knowledge of this letter? A. I don't recall seeing that [38] letter. No, sir.

Q. Isn't it a fact, Mr. Bohrer, that where these sites are going to be and what lands you are going to take is kept confidential within your Corps of Engineers? A. No, sir.

Q. All right. To get back—and I don't want to be redundant, this is the last time I will ask you—what specific public meetings and what dates and where were they held to acquaint the public about these different public sites? I'm asking for specific dates and places. A. I don't know specific dates and places. I do know they were held. I would add that the people in the area knew they were acquiring land, they knew they were acquiring land for public access areas.

Q. You can't give us dates and places, is that correct, sir? A. I cannot.

Q. Now, do you know a General Nosan? A. Yes, sir.

Q. What is his position? A. He has retired.

[39] Q. What was his position at the time the dam was contemplated? A. He worked in our—what we call our Projects Planning Branch. He was an engineer in our Projects Planning Branch.

Q. What was his rank? Was he a General? A. Well, he was a civilian at the time he worked with us. He was a General in the Army Reserve.

Q. Now, what part did he play in acquiring land? A. None.

Q. Did you have any conversation with him concerning Site No. 7 or were you present when Mr. Morgan had any conversation with him? A. I can't recall any.

Q. You don't deny that he did point out Site No. 7 to the authorities?

Mr. Rivers: I'm going to object to the way the question is phrased.

The Court: Objection sustained. He may ask him if he knows something, not if he can't deny something he doesn't know anything about. That doesn't [40] prove that it happened.

Q. Do you know that General Nosan did point out to the Corps, the people that worked for the Corps, that Site No. 7

would be a very advantageous place for them to have? A. No, I do not.

Q. Do you know how the Corps came to choose Site No. 7 since it was not the original place that was contemplated? A. Yes. This is done in coordination between Project Planning Branch, in which Mr. Nosan worked, and our Real Estate Division.

Q. So it was done between the branch Mr. Nosan worked in and your division? A. That is right.

Q. So Mr. Nosan's branch would have some influence in determining where Site No. 7 would have been put? A. That's right.

Q. Now, do you recall the specific reason why Site No. 7 was chosen? A. Well—

Q. Why the plans were changed? A. —as I recall, it was studied [41] the same as several sites were studied around the reservoir and this was decided to be a good access point because of the embayment area and the topography of the land.

Q. Do you recall the time of the meeting that they decided to take in Site No. 7, change the plans to include it? A. No, I do not.

Q. Were you in on that meeting? A. Well, of course, we don't decide these things in one meeting. There are many discussions and many facets of study of this thing, the engineering studies, real estate studies, and this becomes then a matter of coordination. So I can't reduce it to one meeting, but I did participate in some of them.

Q. Was General Nosan present? A. Well, I worked with General Nosan, but I don't recall specifically whether—I can't recall the date specifically on Site 7.

Q. Well, you are not saying he didn't work on Site 7, are you? A. No, sir. Probably did. There are many people in the Project Planning Branch that worked on Site 7.

[42] Redirect Examination

By Mr. Ernest W. Rivers
United States Attorney:

Q. Do you know—the project wasn't completed when this declaration of taking was filed in September '62, was it? A. The reservoir was placed in operation on the 4th day of March 1963.

Q. It was not. Do you know what proportion of the project was completed at the time the DT was filed? A. I don't know specifically. I could guess.

Mr. Solomon: Object to that.

The Court: I want to correct any impression I may have left when I read this statement which I have written out. I said that if the land is within the area to be taken, no enhancement in value by reason of the project will be allowed and I went on to say if it was not contemplated to be taken at the original taking, owner has a right to enhanced value by reason of its proximity to development.

I think my statement is too broad and I think from the Miller case—I state this to you because I don't want you to be misled—I did state that [43] to the attorneys and I want to correct that.

Now, Mr. Bohrer, the question is whether the respondent landowners, that is the owners of this land in question, were probably within the scope of the project from the time the government was committed to it. If they were not, but were merely adjacent lands, the subsequent enlargement of the project to include them ought not to deprive the respondents of the value added in the meantime by the proximity of the improvement. If, on the other hand, they were, the government ought not to pay any increase in value arising from the known fact that the lands probably would be condemned.

Now, that is the law in this case. There are two things in it. In the first place, I want to ask you from your knowledge of the situation here and the background of this and having attended these meetings, I want to ask you first, if these lands in question here that we are going to fix value on were probably within the scope of the project?

The Witness: These lands were included within the scope of the project in our General Design Memorandum and—because part of the area we are talking about is required by flood control.

[44] The Court: All right. Now then, that was from the—you say from the begninning of the study of the thing intensively, I know not going back to '38 or anything of that kind, but when you began to study this thing intensively, knowing that it was going to eventually culminate in this development.

The Witness: Yes, sir, 1958.

The Court: Back in 1958. Now then, the next question, was that fact known, was it generally known to the public or it says here, "If, on the other hand they were, the government ought not to pay any increase in value arising from the known fact that the lands probably would be condemned." That would imply to me that it was known to the public or known generally, like you knew the development was going to be had, knew they were going to build a dam. From the publicity or discussions or investigations or sending your engineers or employees or supervisors into that area, could you say that this fact was known generally that this was probably within the area to be taken?

The Witness: I would say so, without a doubt, Your Honor, that it would be generally known, because we had negotiators in the area, our engineers were [45] in the area—

The Court: I mean this particular land, not a general thing. Of course, that was pretty well publicized. It would seem to me that the rule of law which the Supreme Court is asked to apply in these cases is first that the land in question was probably within the area from the beginning, we will say, or rather from the beginning of the intense study of the development, and that that fact was known, that the probability of this land being used was known generally. Would you say it was or wasn't?

The Witness: I would say it was.

The Court: All right. That is all.

Questions Cont'd by Mr. Rivers:

Q. Was the elevation line to where—the fee taking line, was that generally known? A. Yes, sir.

Q. Was that published? A. Yes, sir.

Q. And the easement area, was that elevation line? A. Also known and published.

[46] Recross Examination

By Mr. Erwin S. Solomon
Counsel for the Landowner:

Q. In other words, the elevation line for the water was 544 feet, is that correct, sir? A. That's right.

Q. And then the easement was 566? A. 566.

Q. Now that, of course, is in this property and we are not arguing about the acreage there. We agree that—we will stipulate that that was known that that was going to be taken. We are talking about the remaining 78 acres, in answer to the Court's question. Do you say that this was known generally or by the landowner, that this specific 78 acres was going to be taken?

The Court: Probably.

Q. Probably to be taken? A. I would say so, because part of the land, this land in question, adjoins the land which you are talking about. In other words, the land for the flood control.

Q. All right then, where— A. (continuing) Any land that is in proximity of the reservoir, that adjoins the flood [47] control pool is likely to be taken. The public, I feel, is on notice that their land could be acquired for this project.

Q. Well, you are saying that any land along the shore line is probable or likely to be taken? A. That's right.

Q. And that is what you base your conclusion on? A. Yes, sir.

The Court: Anything further, Mr. Rivers?

Mr. Rivers: Nothing further.

The Court: You may stand aside.

. . . . . .

[48] The Court: Do you want to offer anything on this?

Mr. Francis: Yes, sir, if we may.

The Court: Do you want to offer any other witness?

Mr. Rivers: No, sir.

Mr. Francis: Call Mr. Charlie Whittle.

. . . . . .

COLLOQUY

[72] . . . .

The Court: Do you gentlemen want to be heard on this, on either side?

Mr. Rivers: I just want to say one thing, Your Honor, this purchase was made in October of '59, in January '60 the plan was approved by the Division Engineer, it was submitted in March of 1959.

The Court: Mr. Solomon.

Mr. Solomon: Which just goes further to prove that we didn't know it was going to be taken. The evidence we

offered was based on probability. I think the court would have to make up its mind, was it probable, was there a probability that this particular 78 acres was going to be taken for a recreational area. And [73] the second thing, I think the cases disclose, was there a disclosure to the public of this matter. I think from the witnesses here—Mr. Bohrer said he thinks that there were these disclosures but he can't tell us when or where—we brought in citizens, two citizens from the county, who are familiar with property there, who know the people there and they said they did not know of any probability of it being taken. I think this falls squarely under the cases. I agree that the Miller case is controlling and I think each one is a factual situation. I think the court would have to apply the law of the Miller case.

The Court: Gentlemen, I think this is a mixed question of law and fact and it addresses itself to the court to be determined before we go into the trial of the case.

The Miller case is controlling and the court finds in its judgment, in the light of the testimony here of Mr. Bohrer, that there was a probability of this particular land being taken, even back before it was actually taken, or before the project was actually started. Now, we have here the testimony of these witnesses, Mr. Parsley and Mr. Moody, and also Mr. Whittle, but to undertake what is generally known by the public is a practical impossibility of proof. However, it must be [74] conceded from a practical standpoint that with that development down there, the public kept itself pretty well advised. I have an idea it was a rather considerable topic of conversation.

Seriously, I question the soundness of the rule, with all due respect to the Supreme Court; in other words, I don't think it is the intention of the government to put in these recreational areas, I don't think it is the intention of the Congress to put in these recreational developments in these watersheds and flood control projects, making attractive sites for owners of land, even those who speculate on it, then go out and the government itself take up all these attractive and available sites that might be developed by independent, private enterprise. But that is not what this case says. Now, this was back in 1943. Probably the appellate court would modify the rule to a certain extent,

but I can't do it. It seems to me, in a sense, unfair that these developments that are supposed to be for the benefit of the people, local as well as traveling tourists, that the government should make these developments and then go out and say, "Well, this beautiful site here that this owner could have developed was probably within our thought, because the government wants to develop it for him," take [75] advantage of that and deny him the right to have the real value of his property. But I can't change the rule and the witness for the United States testifies that it was within the probability, it was discussed during the thing and even the public generally understood about it, because it was adjacent to and within the contemplation of everyone who was interested in it at all, that it might probably be taken.

So, I am going to hold that you will have to limit yourself to the value of the property on the date of the taking.

Mr. Rivers: Less any enhancement.

The Court: On the date of the taking less any enhancement, which it might have received by reason of this development which was reasonably anticipated or the probability that this property might have been taken, and I will have to tell the jury that in my instructions. Of course, you have got to fix some date, the date of the taking has to be the date, they fix the value but you have to also instruct them that they can not award any enhancement by reason of the development.

Now, that is what I am going to have to instruct the jury under this Miller case. Very frankly, as I say, I think that the rule might be somewhat [76] modified. I think it should be, but I am bound by it. I can't modify it.

Mr. Francis: May we approach the bench for just a moment?

The Court: The jury is not here. You can say whatever you please.

Mr. Solomon: What are we limited to, as to highest and best use under your decision?

The Court: Well, here is the question that you will have to address to your experts: What was the fair and reasonable market value of this land on the 18th day of April 1962, not considering any increase in value which

it may have had by reason of the development? What was it worth for its highest and best uses, which was farming land, according to our testimony up to this point? I don't know whether it had any minerals or whatever. The rule would be identically the same as if there had been no development. What is the fair and reasonable market value of this land for its highest and best uses and purposes, not speculating, but what might reasonably be anticipated, but not to be enhanced by the fact that there was a dam built to make this lake.

Mr. Solomon: May I ask one other question. I understand that rule. On the residue of the [77] 140-some acres, is the government limited to showing the lots, that is their enhancement by the lake, since we are limited on the other side?

The Court: I didn't think you had anything as to the residue.

Mr. Solomon: We are not making any claim, but I don't want them to set off enhancement by the residue.

Mr. Rivers: I think we are entitled to.

Mr. Solomon: I don't think so.

The Court: I don't understand what you mean.

Mr. Solomon: Measure of damages would be the actual land taken and the damage to the residue. There was a residue of Tract 603 not taken, 140-some acres. We are waiving the second element of damages, damages to the residue, 140-some acres. The government, I assume, would want to come in and say that 140-some acres of residue has been enhanced because of the lake.

The Court: I think they would be entitled to do that, under the Berry case that we have right in this court. [78] Mr. Rivers: There is a statute right on it that says we have.

The Court: And the Court of Appeals for the Sixth Circuit said that they had a right to show that.

Mr. Solomon: I would like the record to show then that we are being limited by not being able to show the highest and best value considering the lake, but that the government is not being limited in showing enhancement to the residue.

The Court: That is the law. I didn't make it. I don't agree with it, but I am bound by it.

Is there anything further, gentlemen?

Mr. Solomon: Can I have an exception?

The Court: Yes, you are given an exception to the court's ruling.

Mr. Francis: Your Honor, we are going to have to regroup just a little bit.

The Court: Yes, I am going to give you a recess. How much time do you want, Mr. Francis?

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COLLOQUY

The Court: Approach the bench, gentlemen, please.

(Reporter's note: The following occurred at the bench in the presence of counsel and the court, in the presence but out of the hearing of the jury:)

The Court: I want to discuss this question of whether or not you are to introduce evidence on this point or not. Now, I have held that it was a mixed question of law and fact and the court ruled that it was limited, as I heretofore pointed out.

Now, in this Miller case, evidently they submitted that question to the jury.

Mr. Solomon: That is what I said yesterday, Your Honor.

The Court: I am just afraid it is going to be error here, if I do not do that.

Mr. Solomon: It says, in so charging the jury the court was correct in his instruction.

The Court: Yes, sir, but the instruction was, "If in the instant case the respondents' lands were, at the date of the authorizing act, clearly [84] within the confines of the project, the respondents were entitled to no enhancement in value due to the fact that their lands would be taken. If they were within the area where they were likely to be taken for the project, but might not be, the owners were not entitled, if they were ultimately taken, to an increment of value calculated on the theory that if they had not been taken they would have been more valuable by reason of their proximity to the

land taken. In so charging the jury the trial court was correct."

Mr. Rivers: May I see that opinion just a second.

I can show you the question, how it was asked and how it was handled and how it went up. Now, here was the question, Your Honor:

"The respondents offered opinion evidence as to fair market value of the tracts involved and also as to severance damage to lots of which portions were taken. Each witness was asked to state his opinion as to market value of land taken as of December 14, 1938, the date of the filing of the complaint. Government counsel objected to the form of this question on the ground that, as the United States was definitely committed to the project August 26, 1937, then the respondents [85] were not entitled to have included in an estimate of value, as of the date the lands were taken, any increment of value due to the Government's authorization of, and commitment to the project. The trial court sustained the objection . . ."

Now, the trial court was the one that affirmed, the appellate court reversed, and then it went up and then the Supreme Court sustained it.

The Court: How are you going to get away from that language there, " . . . in so charging the jury the trial judge was correct"? That is exactly what I ruled on, but it says charge to the jury. It is not too clear, but apparently from that—I was going to use that in my determination, but that says, " . . . in so charging the jury the trial judge was correct." Did you find what I had there? Just read that right there (indicating).

Mr. Rivers: Your Honor, they will get the same charge because of the fact that the jury knows that the project is in, we are trying this five years after the date of declaration of taking.

The Court: But he evidently submits that question to the jury.

Mr. Solomon: Yes, sir. He did in this case.

Mr. Priest: He told them if they [86] found he was not entitled to—

Mr. Rivers: That is commissioners, Your Honor. I know, I read that last night. This is the case—

Mr. Solomon: The *Miller* case say that and that is controlling.

Mr. Rivers: Your Honor, the *Crance* case, which I cited, is a case right on it and the Eighth Circuit—

Mr. Priest: The Eighth Circuit says by agreement of the parties the question was decided by the court.

The Court: You are not agreeing to that here.

Mr. Solomon: We are not. That is what they are insisting on here.

Mr. Rivers: Well, Your Honor, they upheld this question that was asked.

The Court: I know, but you read that language and I think he is going to have to offer proof.

Mr. Solomon: The proof we offered to the Court?

The Court: Yes. I can't distinguish [87] any other thing on that.

Mr. Francis: If Your Honor please, could I just make a supplemental statement to the jury in the opening of the case?

The Court: That is the reason I called you up here. That is going to have to be the ruling of the court.

Mr. Rivers: I want to show an objection. I think the court was right in the first ruling.

The Court: Well, I thought I was too, but "in so charging the jury, the trial court was correct," and that is exactly what I decided as a matter of law. This says charge the jury.

If you want to make an additional statement, you may do so.

(Thereupon the colloquy at the bench ended)

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Evidence for the Government

MAX BOHRER

being called as a witness in behalf of the government, first being duly sworn, testified as follows:

Direct Examination

By Mr. Ernest W. Rivers
United States Attorney:

Q. State your name please. A. Max Bohrer.

Q. Where do you live, Mr. Bohrer? A. Jeffersonville, Indiana.

By whom are you employed, sir? [179] A. Corps of Engineers, at Louisville.

Q. And how long have you been with the Corps of Engineers? A. Twenty-four years.

Q. And what is your present occupation with the Corps of Engineers? A. I am Assistant Chief of the Real Estate Division, in Louisville.

Q. Now, were you Assistant Chief back in '58 and '59? A. Yes, sir.

[180] (Reporter's note: The following testimony was offered in the presence of the jury:)

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By Mr. Ernest W. Rivers
United States Attorney:

Q. State your name please. A. Max Bohrer.

Q. Where do you live, Mr. Bohrer? A. Jeffersonville, Indiana.

Q. By whom are you employed, sir? A. Corps of Engineers, at Louisville.

Q. And how long have you been with the Corps of Engineers? A. Twenty-four years.

Q. And what is your present occupation with the Corps of Engineers? A. I am Assistant Chief of the Real Estate Division, in Louisville.

Q. Now, were you Assistant Chief back in '58 and '59? A. Yes, sir.

[181] Q. And how long have you held that position, approximately? A. Approximately 10 years.

Q. Now, are you familiar with Tract 603 in the Nolin Reservoir? A. Yes, I am.

Q. Now, when was this project first authorized by Congress? A. May I refer to my notes?

Q. Yes, sir. A. This project was approved by the Congress in the Flood Control Act, 28 June 1938.

Q. When was the first money appropriated by Congress for the acquisition or construction of the project? A. Well, the first money appropriated was for planning purposes on the 20th day of July 1956.

Q. That was planning money, I believe you said? A. Right.

Q. Money for planning. When was money appropriated for the acquisition or construction of the project? [182] A. The construction money for the project was made available by the Congress on the 12th day of October 1958 and in the construction money, money was made available for the acquisition of lands.

Q. Now, what is the policy of the United States with relation to recreational areas or public use areas?

Mr. Solomon: If Your Honor pleases, I object to the policy. This witness can state what—

The Court: Read the Question.

Mr. Rivers: All right. I will put it this way.

Q. The regulations of the Corps of Engineers provide for the acquisition of recreational areas? A. Yes, they do.

Q. How long has that been in effect, sir? Was it before the beginning of this project? A. Oh, yes. Since about 1944.

Q. What size recreational areas do your regulations provide for, sir? A. Well, of course, they vary in size depending on the particular location and the requirements. Sometimes they may be as small as 50 acres and [183] they might go as high as three or four or five hundred acres.

Q. Is it contemplated when a project is first authorized that it will have recreational areas? A. Yes, sir.

Q. Now, do you know when the first declaration of taking was filed in this Nolin project? A. No, I'm not sure.

Mr. Rivers: Your Honor, could I ask the Court to take judicial notice that the first declaration of taking was filed in Civil Action 677, on January 5, 1959.

Q. Would you explain to the jury just how these projects are planned? A. Well, of course, when we get the planning money allocated by the Congress, then the engineers start the planning of the project and we draw up—we prepare what is called a General Design Memorandum and this memorandum encompasses all planning facets of the project, all of the construction features, includes the outlet works, the dam, the roads, the acquisition of lands, and access points, all the construction features.

Now, the General Design Memorandum [184] of course, is just what it says, it is general in nature, that is, it is a preliminary document, but it does outline the plans of what we propose to do. Then, as the project progresses, we make up what are called Detail Design Memorandums. In other words, we might have a Design Memorandum for the outlet works or one for the dam, which goes into the details of the structure, details of what we are writing about, and this is true in the land acquisition. We make up what is called a Real Estate Design Memorandum, which goes into detail as to what lands we will acquire for the project.

Q. Now, you are familiar with Preliminary Master Plan, Design Memorandum No. 8, are you, sir? A. Yes, sir.

Q. Now, when was that prepared, sir? A. Well, that was prepared during the summer of 1959 and was submitted through our channels, through the Division Engineer at Cincinnati, and then to the Chief of Engineers, in Washington, and then was approved by the Chief of Engineers as a document for acquisition and construction of public access points, on the first day of October 1959.

[185] Q. Now, when was it submitted to the District Engineer at Louisville? A. Well, the District Engineer at Louisville prepared the document.

Q. Yes, sir. A. And it was submitted—the District Engineer at Louisville prepared the Design Memorandum and submitted it to the Division Engineer at Cincinnati on the 2nd of March 1959.

Q. March 2nd, 1959? A. Yes, sir.

Q. Now, in that memorandum was Tract 603 designated, sir? A. Yes, sir.

Q. As what? A. As Access Site No. 7.

Q. Was that for a recreational area? A. Yes, sir.

Mr. Solomon: I object to leading the witness.

Is there any difference between a recreation area and an access area? A. None whatsoever. They [186] are synonymous.

The Court: Ask him when this Tract No. 7 was designated.

Mr. Rivers: March the 2nd, 1959.

Q. Approximately how long does it take to prepare a plan like that, sir? A. Well, of course, the planning in the project, this being an integral part of them, may take as long as two years to get something that would come out as a usable document.

Mr. Solomon: If Your Honor please, may we take a look at what—his manual there or whatever it is?

The Court: I assume he has no objection to it.

Mr. Rivers: I have no objection.

The Court: Do you want to show it to them?

Mr. Rivers: Yes, sir.

(Reporter's note: The document was given to counsel for the landowner.)

Mr. Solomon: May we have just a moment? We have never had access to this.

The Court: Yes, sir.

[187] Mr. Solomon: I don't want to hold up the Court and jury. Will we have the right to cross-examine from this?

The Court: Well now, of course, I can't make them expose to you—there has been no motion or anything here—their private files.

Mr. Solomon: Since he is testifying from it—

The Court: Well, I know, but he has a right to use his memorandum to refresh his recollection on things, without making available to the other side all of his work files. It has to come under the discovery rules and this is coming here at this time without any preliminary motion of any kind.

Mr. Solomon: If Your Honor please, I know Your Honor is right, but this witness was not known to us until—

Mr. Rivers: Yes, he was. He is on the list.

Mr. Francis: I didn't think he was, but he says he was.

The Court: Well, Mr. Rivers says he was.

Mr. Solomon: Well, I am mistaken. [188] I thought the statement was made that he was not.

Mr. Rivers: Submitted May the 24th in letter to the clerk.

Mr. Francis: May 24th, that's right. The case was set on what date originally?

Mr. Rivers: That is May 24th, 1966, a year ago.

Mr. Solomon: But I can cross-examine?

The Court: Very well. He may have no objection to your looking at it, but I can't take it up in the middle of the case at this time, under the discovery procedure.

Q. Now, was the project—how far—put it this way—what percentage of the project was completed at the time this declaration of taking was filed in April of 1962? A. Our acquisition was completed in December 1963. I would say probably 70 or 75 per cent.

Q. And this acquisition is down the main stream of Nolin River, where the impoundment is? A. Yes, sir.

Q. Now, Mr. Bohrer, could any landowner come in and request to see the plans regarding [189] this reservoir at the Louisville office? A. Yes, sir. They are public records.

Q. Available to them? A. Yes, sir.

Q. Did you all have an office in Brownsville? A. Yes. We opened an office in Brownsville, in the Reynolds Building, by the way, the Kyrock Building, in Brownsville, on the 1st day of June 1960, and this was there for the purpose of advising the landowners about the project, where they could come in, view the maps, where they could talk with our people and, of course, it served as a headquarters or working office for our negotiators to work out of and to make it kind of their home office there, where they could collect their records and their data and so forth. But many landowners did avail themselves of a visit to this office.

Mr. Rivers: May I approach the bench, Your Honor, at this time?

The Court: Yes, sir.

(Reporter's note: The following occurred at the bench in the immediate presence of counsel and the Court, out of the hearing of the jury:)

[190] Mr. Rivers: I want to make a motion to the effect that the Court rule as a matter of law that this public record was a matter of public knowledge as of March 1st, 1959.

The Court: Overruled.

(Thereupon the colloquy at the bench ended)

Mr. Rivers: You may ask.

Cross Examination

My Mr. Erwin S. Solomon
Counsel for the Landowner:

Q. Mr. Bohrer, you say your home is in Jeffersonville, Indiana? A. Yes, sir.

Q. And you are the Assistant Chief of the Real Estate Division for the Corps of Engineers? A. Yes, sir.

Q. And you have been stationed in Louisville, is that correct, sir? A. Ever since I have been with the Corps, yes.

Q. Twenty-four years? A. Yes, sir.

Q. Now, did you plan this Nolin [191] Dam, yourself, or part? A. No, sir.

Q. Did you acquire the property for it? A. No, but I had a part in it.

Q. Sir? A. No, but I had a part in it.

Q. You did not acquire it. Did you have a part in acquiring the property? A. Well, by virtue of my office. I naturally had a part in it because—

Q. Well, you didn't come to the dam physically to do it? A. I was in the Nolin field office on several occasions, on matters connected with the Nolin Reservoir, yes.

Q. How many times were you in Edmonson County in 1959, Edmonson County or Hart County, pertaining to this dam? A. I don't know whether I could say exactly, maybe half a dozen times.

Q. In 1960? A. Maybe 10 times.

Q. In 1961? [192] A. I am strictly guessing. In '61, maybe about the same.

Q. So, your visits were not frequent? A. Well, of course, we carry on a great deal of our business by telephone with the field offices and along—

Q. I'm talking about your physical presence. A. Through that medium I had quite a few contacts with them.

Q. I'm talking about your physical presence. A. What I told you.

Q. Now, isn't it true that in your original planning for recreation areas on the Nolin lake that Site No. 7 was not contemplated? A. Site 7 was not included in the Preliminary Master Plan when it was submitted, that's correct, but it was added before it was approved.

Q. But it was added? A. Yes, sir.

Q. But the original planning did not contain Site 7, which is part of Tract 603— [193] A. That's right.

Q. —that is in controversy here? A. But before the plan was approved, was processed and formulated, it was approved by the Chief of Engineers and it was included in the plan.

The Court: Was that on March the 2nd, 1959 or January 1959?

The Witness: No, sir, the approval of that memorandum, Your Honor, was the 1st day of October 1959.

The Court: The first day of October, approving this?

The Witness: Design Memorandum No. 8, which is the Preliminary Master Plan.

The Court: October 7th?

The Witness: October 1st.

The Court: 1959.

The Witness: Yes, sir.

Q. Now, may I take a look at the front page of this book, please, sir, that you testified from (taking document from the witness). And for my information and the Court and jury's, it says here, [194] "Div. Engr. US Army Engr Div. Ohio River, Cincinnati, Ohio, 14 Sep 1960" and it is headed "Design Memorandum No. 8 Nolin Reservoir, Kentucky." Is that correct? A. That's right.

Q. "(Preliminary Master Plan)"? A. Right.

Q. "TO: Chief of Engineers." Now, this is the date of the letter, September 14, 1960? A. That's right.

Q. "TO: Chief of Engineers, Department of the Army, Washington, D. C.

"Approval of the proposed changes in development of sites 1 and 7 is recommended." A. Right.

Q. Now, that is on September 14, 1960, is that correct, sir? A. That has nothing to do with the taking, though. That is on something else.

Q. Doesn't it say: "Approval of the proposed changes in development— A. There is another indorsement on the change.

Q. We will get to that. And it is signed by the Division Engineer, C. L. Landaker, Colonel [195] Corps of Engineers, Deputy Division Engineer. Is that correct, sir? A. That's correct.

Q. Then, I will quote again:

"Office, Chief of Engineers, Washington 25, D. C.,
3 October 1960.

"TO: Division Engineer, U. S. Army Engineer Division, Ohio River, Cincinnati, Ohio

"Approved subject to the following comment.

"A. There is insufficient information in the subject design memorandum to determine the justification for a 50-foot wide ramp at Site 7. The width should be determined in accordance with criteria contained in EM 1130-2-312.

"For the Chief of Engineers:

/s/ MARK S. GURNEE."

Is that right? A. That's correct.

Q. In other words, on September 14, 1960, the Corps of Engineers was still asking for approval of proposed changes and in development of the Sites 1 and 7? A. Only as to the construction features.

[196] Q. That's right, sir. But you were still in the preliminary stages because it says Preliminary Master Plan, doesn't it? A. As far as—

The Court: Well, don't argue with the witness. Just ask him.

Mr. Solomon: Yes, sir.

Q. The first negotiation for the Site 7, which is part of this Tract 603, was in 1961, isn't that correct, sir? A. The first contact we made was the 13th day of March 1961.

Q. And the property was purchased October of '59 and January of '60, isn't that correct, by Mr. Reynolds? A. I don't know that.

Q. You don't have that in your records? A. No, sir, I don't.

Q. So, the original planning of this project did not encompass Site 7, isn't that correct, sir? A. The original planning, yes.

[197] Q. That's right. Now, did you, you, personally, in your official position, attend any meetings, call any meetings, to disseminate and disclose to the people where the recreation areas were going to be, in the years of '61, '62 or '63? A. Of my own knowledge, I know of none, but there may have been some.

Mr. Solomon: Your witness.

Redirect Examination

By Mr. Ernest W. Rivers
United States Attorney

Q. That was the final plan that was used to acquire Site 7, wasn't it, sir—8, Design Memo No. 8? A. Yes, sir.

Q. And it was approved October 1, 1959? A. Right.

Q. Now, from the beginning of this project, before it ever started, it was always known, wasn't it, sir, that when you come up the Nolin River—

Mr. Francis: Object to the leading question. Object to leading the witness.

The Court: Overruled. Go ahead.

[198] Mr. Rivers: All right.

Q. This tract adjoins Nolin River, is that correct, sir? A. That's correct.

Q. And Nolin River was the river that was being damned? A. That's correct.

Q. Was it true or not that that—part of that property would have to be taken for the reservoir proper? A. A major part of that property was required for flood control.

Mr. Rivers: No further questions.

Recross Examination

By Mr. Erwin S. Solomon
Counsel for the Landowner

Q. For flood control, but not recreation? A. The major part for flood control and the rest for recreation.

Q. Now, the original plans were for flood control up to 544 and 566, isn't that correct? That is what you are talking about, the major portion of this creek? [199] A. Well, I don't know what original plans you are talking about now.

Q. The original plans before you took in Site No. 7. A. You mean in the Preliminary Master Plan?

Q. That's right. A. Yes, that's right.

Q. Now, are you telling—let me establish this first. How many sites are there, recreational sites, on Nolin River, Nolin lake? A. I think there are six, but I better confirm that, if I may (pausing to look at records). I beg your pardon. There are eight access sites.

Q. Well, there is one in Iberia, is that right? A. Yes, sir. There is one at Iberia.

Q. Dog Creek? A. Yes, sir.

Q. Wax? A. Yes.

Q. Moutardier? A. Yes.

[200] Q. Briar Creek? A. Yes.

Q. What are the others? A. Dickeys Mill and then one at the dam.

Q. Dickeys Mill and the one at the dam were not—were later on, an afterthought, too, weren't they? A. No, sir. They were included in DM No. 8.

Q. Did you in your—I show you Nolin Dam, River Dam and Reservoir, U. S. Army Engineer District, Louisville, Corps of Engineers, dated July 1964. How many recreation sites are listed? A. There are five of them.

Q. Well, what happened to the other three? A. Well, the others are probably not developed yet, but we buy the lands and plan for them and they are constructed later.

Q. As late as July 1964, you didn't even have them on their official map. A. Well, those are the ones that are in operation.

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[236]

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COLLOQUY

The Court: Approach the bench gentlemen, please.

(Reporter's note: The following occurred at the bench in the immediate presence of counsel and the court, out of the hearing of the jury:)

Mr. Rivers: I would like to renew my motion that all evidence regarding enhancement in valuing this be excluded.

The Court: Let it be overruled.

[237] Now, gentlemen, do you want to offer instructions for the landowner?

Mr. Solomon: Yes, sir, I have some. I don't know your policy, whether you give them verbally or not. I might be duplicating possibly some.

The Court: Have you given the other side copies of these?

Mr. Solomon: Yes, sir.

The Court: Is that all?

Mr. Solomon: Yes, sir.

The Court: Now, the court is required to tell you what it proposes to give in order that you may know how to argue it to the jury.

Now, the instructions of the United States are a pretty long dissertation, sort of an American Jurisprudence type of text and I'm going to cover this, I think pretty generally, as you have offered it, but I'm not going to give it verbatim as you offer it. I think I will cover it adequately, but this is just a recitation of a text on the matter of condemnation cases and I think it is covered, the same thing is covered as the landowner has covered here in A, B, C, D, E, and F. [238] What you're going to argue, of course, is the value of this land on the date of the taking. It is not shown here to have any value at all except for farming purposes. Any other value would be highly speculative, unless the jury believes that it was not contemplated. You have to bring that in, as I have suggested it to you. The instructions which I am going to give are out of the Miller case and I have prepared these interrogatories, which I handed you. That is the only way I know to submit it to you. It is very difficult to get at.

hink it

Mr. Rivers: This interrogatory, Your H there.
was generally known, I think should be taken
The Court: That is what the case said. Is, that
Mr. Rivers: From the known fact, in othe
the project was coming through. rnment
The Court: "If, on the other hand . . . . th om the
ought not to pay any increase in value ari mned."
known fact that the land probably would be
I can change that to *known fact*, if you wan e that,
Mr. Francis: If you would like [239] t
it would be following the language of the
The Court: I'm going to have to give me ex-
planation of these things and—
Mr. Rivers: I want to object to it, Your to the
interrogatory being submitted.
The Court: I wouldn't be surprised if yo't right.
Mr. Solomon: Where is there any evidder the
Miller case that there was a probability th people
heard? In other words, there was no wi ere that
testified that.
The Court: Mr. Bohrer testified that ober the
1st, 1959, they made a record of it there ffice and
that the people came in and it was gener own and
generally noised about that you could co at office
and talk to anybody, anything you wante out that
case.
Mr. Solomon: I thought it was Octobe hat they
first agreed on—
The Court: Well, he said there was a there in
the office at that time.
Mr. Francis: The way I understood it,
orandum that went from the Corps [240 a mem-
further up the line of the Corps of Engingineers,
The Court: He said that it was desig
the 2nd, 1959, and that it was approved, n March
proved on October the 1st, 1959, and it was ap-
of record in the office there in Brownsvi a matter
Mr. Francis: But, again, going to the
has to show from the outset—and I'm c case, he
Miller case—that the government disclose from the
a probability that this particular tract— there was

Mr. Rivers: Show me where it says that in the Miller case.

Mr. Francis: "Legal principles applicable to this case are stated in Miller v. United States . . . . . also a controversy in eminent domain over value enhancement resulting from the very project for which the property in suit was condemned. The Court ruled that where a public project was so planned and described the government from the outset as to disclose a probability that a particular tract or area would be required for the project somewhat later, any enhancement of value between that disclosure of probable future need and subsequent condemnation [240-A] of a particular tract should not be included in the condemnation award for that property." That is right there.

Mr. Rivers: That is not Miller.

The Court: That is United States v. 172.80 Acres of Land, 350 F.2d 957.

Mr. Francis: They were paraphrasing the Miller case. It says the court ruled—

The Court: That's a Ninth Circuit case.

Mr. Francis: Yes, sir, but they are quoting from the Miller case there, paraphrasing it.

[241] The Court: What was your criticism of that interrogatory?

Mr. Rivers: I don't think it should be submitted.

The Court: But you made a point—

Mr. Rivers: "That it was generally known" should be left out.

Mr. Francis: I thought you said it should be a "known fact".

The Court: No, he is objecting to all of it. He is not committing himself to anything. I am changing that to "known fact", which is the language of the Miller case.

All right, gentlemen, what do you want to do with this case?

Here is a form of verdict drawn up here. I gave each one of you a copy. Now, of course, I'm going to explain this part and I'm trying to get it so it can be separated, so we will know what we have got when we get through with the case.

Mr. Rivers: I want to object to that on the same ground, the enhancement of the 78 acres.

[242] Mr. Francis: This, together with the interrogatory, should make it very clear.

The Court: I think so. I overrule his objection.

What do you want to do with the case, go on with it this afternoon or wait until Monday on it?

Mr. Rivers: We are going to get hung up here, I'm afraid.

The Court: You are going to want to argue it for an hour and then I have to instruct the jury. What do you mean, get hung up Monday?

Mr. Rivers: No, this afternoon. I'm afraid the jury won't have time to consider it.

The Court: If I submit it, I have to let my alternates go and then I can't get them back if somebody fails to show up.

What do you all want to do?

Mr. Rivers: I would rather come in Monday morning.

The Court: Come in Monday morning at 9 o'clock.

Mr. Solomon: I have another case in another city.

. . . . . .

[243] (Thereupon the colloquy at the bench ended)

The Court: Now, members of the jury, it is 4 o'clock and I am afraid if we undertook to conclude this case, it would be unfair to these litigants and unfair to the jurors, and so I'm going to recess court until 9 o'clock Monday morning. I don't want you to feel that we are rushed right here in the closing hours of the week. You've been here all week and I know you're pretty tired.

I am going to have to ask you to observe, both in the letter and in the spirit, the admonition that you not discuss this case over the weekend with members of your family or any other person. I realize, as I say, that it is a temptation to talk about what you have been doing at court. I don't have any objection to your talking about other cases that are already over, but I hope that you will, and I believe that you will, observe the admonition not to talk about this case or permit any one to talk with you about it or in your presence or make up your minds about it in any way until it is finally submitted to you.

This case has some features which may have appeared to you to raise complications. I don't want you to get the feeling that it is [244] a complicated case. It isn't and when I submit it to you, you will understand perfectly clearly what it is that you have to decide and I am sure you will have no difficulty in making up your minds one way or the other. You will understand the issue, sharply drawn, and you will know what it is that you have to make your verdict on.

The case is not concluded, though, and will not be until the Court finally submits it to you for your consideration. So, during this recess, bear those admonitions in mind. Don't read anything about it if there should be anything in the newspapers. I don't anticipate that there will be, but possibly so. If any of you live in that locality, don't go by that place and look at it. It is not proper for a juror to obtain evidence out of the supervision of the court and outside of the presence of the other jurors. I don't know where all of you may reside in relation to this particular project, but don't make any trips there just to see what it looks like, because that would be obtaining evidence which would not be competent for one juror to have without the others, under the supervision of the court.

And so, with those admonitions [245] in mind, Mr. Marshal, after the jury retires from the courtroom, you may announce a recess until 9 o'clock Monday morning.

(Reporter's note: The court recessed until the following Monday, May 22, 1967, at 9 a.m., at which time the parties were present in person or by counsel and the following occurred in chambers:)

The Court: The attorneys for the respective sides represent to the Court that on Friday, at the Adjournment of court, one of the jurors, Mr. Wingfield—

Mr. Francis: I believe it is R. S. Wingfield.

The Court: —was seen to contact a witness, a member of the jury was seen to contact one of the witnesses for the landowner in the case on trial, with the apparent plan of riding home or partly on the way home with the witness.

The United States Attorney called this to the attention of the Court and is of the opinion that the juror should be excused.

Am I stating that correctly?

Mr. Rivers: Yes, sir.

[246] The Court: No showing is made that anything improper occurred between the witness and the juror, but the Court feels that such intimacy during the trial indicates a question of propriety that should not exist in the trial of a case in this court and over the objection of the attorneys for the landowner states that the juror will be excused from the jury and the first alternate will be called to take his place, to all of which the attorneys for the landowner object and except.

Mr. Solomon: Right, sir.

The other point, Judge, I brought up while we were discussing instructions, I asked the Court whether under the evidence the Court would not instruct the jury to find the value of the land based only on the enhanced value because the theory of the landowner being that there was no evidence that there was probability that the land would have been taken. The Court was of the opinion that there was evidence of probability through the testimony of Mr. Bohrer, who testified for the government. I would like to except and object to the Court's ruling on that point.

Mr. Rivers: I am objecting to [247] the request that the jury be instructed only on the enhanced value.

Mr. Solomon: We take the position that there was no evidence that there was a probability that the land would have been taken. We say that there was no probability the land would have been taken, therefore the enhanced value should be shown and no other value.

The Court: All right. I will overrule it.

Mr. Solomon: I would like to except and object.

(Thereupon the colloquy in the chambers ended)

(Reporter's note: The court resumed its usual place in the courtroom, the parties were present in person or by counsel, and the following occurred:)

The Court: Approach the bench, gentlemen, please.

(Reporter's note: The following occurred at the bench in the immediate presence of counsel and the Court, out of the hearing of the jury:)

The Court: Did you see this instruction which Mr. Francis has just tendered?

[248] Mr. Rivers: It was just handed to me, Judge.

The Court: I am not going to give that instruction. I will number it Instruction X.

Mr. Francis: May I call your attention to the fact, I believe this is the exact language of the Miller case.

The Court: I don't think so.

Mr. Francis: Well, part of it, I mean.

The Court: Well, part of it is. I may cover a part of that instruction. That is just making anything proximate, whether it was in anticipation of probability or not. The Court declines to give it as offered.

(Thereupon the colloquy at the bench ended)

The Court: Now, call the jury please, Mrs. Harris.

(Reporter's note: The names of the jurors were called by the clerk and all answered.)

The Court: Mr. Wingfield, I am going to excuse you from the jury. I will explain this to you later on, but I am going to ask you to step aside. Call the first alternate, Mrs. Harris.

[249] The Clerk: Mrs. Ruth Long.

The Court: Come around, Mrs. Long.

(Reporter's note: The juror Mr. Wingfield left the jury box and his place was taken by Mrs. Long.)

The Court: Now, you may proceed with your arguments, gentlemen.

(Reporter's note: Closing arguments were made by Mr. Rivers, in behalf of the government, and by Mr. Francis, in behalf of the landowner.)

The Court: Members of the jury, it now becomes my duty to instruct you as to the law in this case. I want to say at the outset that you are not to be confused by the great number of figures that have been used. You are not to be confused by any apparently intricate determination of certain legal principles which you may have gotten the impression were involved in this case, and you are not to feel that you are not perfectly competent and qualified to decide the case. Before I conclude my charge, I will give you a very sharp and distinct issue to decide. You won't have any trouble recognizing what it is you have to decide.

And further than that, I might say that I believe of all types of cases to be heard and [250] determined by juries, condemnation cases are of such a nature that they address themselves peculiarly to a jury. In other words, you are talking about something here that you have an everyday knowledge of. Most of the people living in this community have some knowledge of the type of country it is and the kind of land it is that we are talking about in this case. We are all country people. If this jury were sitting here and undertaking to put a value on some city property in Louisville or Lexington or Covington, it might appear rather difficult, just the same as if a jury in New York City were undertaking to place a value on land in Edmonson County. But we are all rural people and we have some idea of the value of land. We are close to the soil and grow up with some understanding of what the witnesses are talking about, at least. We may not have had any particular experience as appraisers, but we do understand what they are talking about, and I want you to realize, as I say, that you will have no difficulty whatsoever arriving at a fair and just verdict.

I am going to have to be necessarily, a little long in this charge. There are certain legal matters which I must cover and certain statements which are included in the law of the case, which may [251] sound somewhat technical, but before I conclude it will all be clarified and you will have no difficulty. I may be somewhat repetitious in order to avoid overlooking any particular part of the charge that is necessary under the law. So I will ask you to bear with me and to realize that at the conclusion of what may appear to be a rather lengthy charge, the whole matter will be cleared for you.

Now, I want to give you very briefly just the background of this law. This is what is known as a condemnation case, wherein the United States Government is exercising the right of eminent domain, that is, the right of the sovereign, the government, to condemn private property for public use. We know in this country of ours that a person has the right to own property. We know and believe that that is one of the things that makes this country of ours great, the individual pride which a person may have in owning land or owning anything without having his government

have a share or any direction over it, except within well-defined legal principles for its own protection as well as for the protection of the community generally. And so you own a farm or you own a house and you are secure in knowing that your government through its police department, through its army and navy, through the various agencies of the [252] government is going to protect you in your right to own and enjoy that property to all legitimate purposes. That is one of the things that makes us a happy people. Those of us who are fortunate enough to own a home feel that way and those of us who may not own a home, but have an aspiration to, can work toward that end and in most cases accomplish it. And so, you have that established principle of law that a person is secure in the ownership of his own farm. We will use the term "farm" because that is what we are talking about here, but there is a higher right of sovereignty, even higher than the individual's right to own property, to own his farm, and that is if his government in its proper agencies determines objectively and unselfishly, as we must recognize the government to act, that that farm is necessary for the full enjoyment of the whole people of the country; then that government has a right to take that farm. I think, to use possibly a more significant description of that, during the last war, the Second World War, it was found necessary for the government to condemn land, condemn farms and come in and take farms for the purpose of establishing army posts, like Breckinridge and like Knox and like Campbell; that if the government did not have that right, we could not successfully defend our country and its people. And so, [253] that is an extreme incident or possibly a more significant incident of the right of the government which I think everyone must concede. And so, it is for the protection of the whole people, that the government should take land to build dams for flood control, maybe not to protect only the people in the locality but people on down the Ohio River, on down the Mississippi, that they had a right in order to protect the whole people to come in and take that farm and build a dam on it or cover it up with water because of a dam, and that is an important right and it would not be right otherwise. The government I think should have that right and we all in fairness must realize.

Also, it is found for the good of our country and for its security and its future greatness, that not only to protect from damage, but to also create areas that the whole people might enjoy the blessings of the great watersheds of this country and its woodlands. A lot of people live in cities, they don't have any big yards and big farms like some of the others who live in the country. Well, it is just as important that the government should say to them, "We're going to make an area available to you where you can go where you can enjoy some of the blessings and things of the country." So, this is a right of sovereignty, and it is a policy of the [254] government to try to serve the people in this way.

Now, when you went into the jury box, I went over this to a degree so that you would understand it. Possibly you don't agree with everything I have said here, possibly you don't agree with the law, but you do agree, I am sure, that you would try the case according to the law and evidence, not to consult your own personal views about whether or not the right of eminent domain is properly administered in this case or whether such right should even exist. It always has been the law and I hope it always will be, because it is, as I say to you, one of your greatest securities, this right of sovereignty, this right of the government to take property for public use. And so you are not to consider, as I say, any personal feelings or any sentiment or any emotion that might arise by reason of this farm being subject to public use.

But the United States government does not have any right to just take that, as some countries might do. It only has a right to take it if it compensates the owner of the property, and by compensation, that means that they shall pay to that owner the fair and reasonable market value of that farm at the time it is taken and by fair and reasonable market value is [255] meant that sum in cash which a willing buyer, a person who wanted to buy the farm but did not have to buy it, would pay for it. Let's use this particular farm, a person who wanted this 256 acres out of this 400 and some acre farm, a person who wanted it but did not have to buy it, was not compelled in order to protect some other investment that they may have, but wanted to buy it, would pay for it in cash to the owner who wanted to sell it, but did not have to sell it, did not

have to sell it because of a foreclosure or because of threatened financial difficulties of some kind, but who actually owned it and freely and voluntarily wanted to sell it; in other words, what we call here in Kentucky, a free and voluntary sale, a willing seller and a willing buyer, neither of whom were compelled to make the trade. That means you are not to give any enhanced value to it, that you are not to say because the government has taken it and the government has plenty of money and is spending money all over the world, why not pay this man for this farm even more than it is worth. That is unfair, that is a violation of your oath to do that. On the other hand, you are not to say to this owner, well, maybe it is not much to him, it is for the public good, people will enjoy the [256] recreation, why pay him so much money. You are not to take that into consideration. You are looking at this as your government, not to have any sentiment for or prejudice against your government. You are not to have any sentiment for or prejudice against the landowner. Just look at this as "A" and "B" and determine from the evidence in this case what the fair and reasonable market value of this land was on the 18th day of April 1962.

Now, there is another phase of this case with reference to this increment. I will give you that in detail. I will clarify it for you so you can see it crystal clear and won't have any difficulty about it.

And so when the government decided to take this land—and I will use this specific instance, rather than speak in general terms—it had a right to do so, it came into this federal court and filed what is known as a declaration of taking, it took all of it, 76 acres of it, and all the rest of it that is involved in this lawsuit. They filed that declaration of taking, they took it and when they took it, they deposited in this court what the government appraisers thought it was worth. This is the way these things work, [257] and I think it is important that you should understand. And then the landowner had the right under the law to come into court and on a motion to withdraw that money right at that time—it was put into the court, the government had fixed its value on this land by its own appraisers—but this landowner wasn't bound by that.

He has a right under the law to come in and say, "Well, you have appraised my farm at so many thousand dollars and I say that is worth much more than that," and he files an answer in court, in which he sets up that the government did not deposit enough money, that its appraisal was too low, and instead of the land being worth what the government says it was worth, it's worth another sum of money, much greater sum than in this instance it is claimed. That then makes up the issue. The case is set down for trial. A jury is impaneled or the court may try it by agreement of the parties if no jury is requested. And then you hear proof, you decide as jurors what the value is. The landowner, having challenged the amount fixed for the value by the government, has the burden of proving by a preponderance of evidence, that is, if no proof was offered, then the case would be dismissed or the case would have to stand on its original value. [258] But when the landowner says it is worth more than that, then he has the burden of proving that it is more than that and he must establish his case by a preponderance of evidence, as it is called in law. It doesn't mean that he must prove that to the exclusion of a reasonable doubt. You have been trying these criminal cases and I don't want you to confuse these cases with that, but he does have the burden of not necessarily more or a greater number of witnesses, but of convincing you that the land is worth more than the United States says it is.

Now, members of the jury, as I say, I may be a little repetitious. I give you these things in general terms and I don't want to overlook giving you the whole law in the case and if I am repetitious, I am sure you will understand it. I don't want to confuse you by too much charge. I sometimes think Old Hickory Jackson, Andrew Jackson, who was a district judge down here in Nashville, before he was President of the United States, was right, the only instruction he ever gave to the jury was, "Go out and do right between these people." I sometimes think you can overinstruct a jury as well as underinstruct them. Maybe it would be [259] best to give just that.

Now, the method by which to determine the just compensation to be paid to the property owner for the taking of a part of his property is, as a general rule—this

is not always the case, but as a general rule—to compare the market value of the property before and after the taking, that is to say, by subtracting the fair market value of what remains after the taking from the fair market value of the whole immediately before the taking.

Now, in this case the government took this 256 acres and I permitted the owners of the land to offer proof to the effect of what it was worth, that remaining part. The nature of the transaction was such that it seemed to me that it would not be fair to the landowner to limit him to a fixed rule, because it would be more difficult to do that and would not give you the picture that you were entitled to have of what he considered, and he has a right to state, what he considered his 256 acres was worth. And it was not such a case as you might take a farm, where half of it was taken and leaving the other half. We have a lot of cases like that, where you would just take the river bottom out but leave all the houses and barns and [260] everything else and you can fix the value of the farm before and after, and you can fix the value by saying what it was worth before and after. But this is not that kind of case and I feel in fairness to the landowner that he is entitled to offer evidence of what he thinks that value was, what the value of that acreage was worth. You will consider all of the evidence, both for the United States and the landowner, in determining just what you think this property was worth.

Evidence has been received as to the sales of allegedly comparable properties in the vicinity and in other areas. Bona fide sales of comparable properties made within a reasonable time before the date of taking of the property involved, may be the best obtainable evidence of market value at the time of taking. Such evidence should be considered to the extent that you find it of assistance in arriving at your own finding of market value.

Now, you may recall that some of the witnesses for the landowner testified that they couldn't find any comparable farms or the sale of comparable lands and that while that might be the best evidence, that other river bottom farms in that locality [261] didn't sell and they could not find sales which they might consider comparable within a short time before this taking of this land.

The United States, on the other hand, offered evidence to the effect that there were comparable sales. The United States fixed its value by making those comparisons. You will take all that into consideration. You realize, of course, though that—I think the law in trying to be perfect—does not take in consideration variables that might occur. There are probably no two farms—I know most of you are farmers, I think most of you are or have knowledge—and you know that there are no two farms exactly alike, even though they may lay side by side, the way they have been taken care of and the way they have been handled and the way they are arranged and so forth. It is not like two city lots on a plat, where one is worth a thousand dollars and it is a pretty good guide that the one next to it is worth a thousand. Farms have a different nature and do not have the same comparison. Out West where they lay land out in sections, they may be comparable, but it is my experience in Kentucky there are no two farms alike, although you can use the sale of farms that are reasonably comparable, [262] in some reasonable proximity or the general area of a piece of land, as a criterion to go by and that is the best evidence. If you can find a comparable sale, that is the best evidence to go by, but according to the landowner here, there wasn't any such thing; so you have to use the next best evidence, to determine by the landowner's standpoint, taking the farm as it was and just what it was at that time worth in value and also taking in consideration the comparable sales that were testified to by the government witnesses.

In every condemnation proceeding, the problem is to determine what the property owner has lost as a result of the taking and not what the government may have gained. Just compensation is intended to cover the loss caused the owner by the taking of his property for public use and not the value of the property as applied to public use. How much the property taken may be worth to the public for those purposes to which it will be applied is not to be considered by you in any way in arriving at the fair market value of the property at the date of taking by the government.

The mere fact that the government intends or plans to take certain property may enhance [263] or increase, or depress and decrease, the fair market value of the

property as of the time of the taking. So, in determining the fair market value at the time of the taking, you are not to consider the fact that the government has taken or plans or intends to take the land. Instead, you are to fix the fair market value on the date of and at a time immediately before the taking, without regard either to any threat or imminency of the taking or to the pendency of any plans or proceedings to take the land.

I think I have been over that before, that's somewhat repetitious, but I do want to be sure that you are advised in that connection.

The compensation to be paid by the United States for an estate or interest in property must be just. In order to be just, the amount of such compensation must be fair, not only to the owner whose property is taken, but also to the public, which is to pay for it. If the amount of your verdict is less than the amount you believe the landowner lost, based upon the fair market value of the property taken at the time of taking, then the compensation is not just to the owner. If it is more than that amount, then the compensation is not just to the United States.

[264] You are instructed that you will not render what is called a quotient award; in other words, you can't take the highest figure and the lowest figure and strike an average. That would not be a good verdict. It would have to be set aside and the case would have to be tried over. That is what is called a quotient verdict and it would not be accepted. So you should not agree that each juror shall set down a sum of money which he individually thinks should be awarded as just compensation and then add all of the said sums together for a total and divide such total by the number of jurors and return your award as the result obtained, whatever it may be. Such an award is merely a mathematical average and would not represent your collective judgment and is therefore improper. Likewise, you should not arrive at your award by any similar mathematical scheme or plan, based upon chance or lot, but should arrive at such award upon the evidence that is most convincing.

The government contends that the portio
ant's land which was not taken in this proc
through enhancement or increase in value
public flood control [265] improvement in
have to take that into consideration, too,
the value.

Two types of benefit may result from a
ment such as involved here, namely, gene
special benefits. It is contended by the U
was argued by the United States Attorn
acres that this man has left have been so
that that should be taken into considerat
enhanced in value. You do have a right to

General benefits are those which result
property of the defendant landowner, b
property in the vicinity; that is to say, t
generally.

Special benefits are only those which a
parcel of land involved in this trial; that i
which are connected with the ownership, u
of a particular parcel or tract of land.

You may not consider any increase in
general benefits, but you may, and shou
increase due to special benefits; that is to
in value, if any, as was caused by the
provement to that portion of [266] defen
was not taken by the Government in th

Special benefits, which do not enhanc
value of the property retained by defenda
and may not, for that reason, be considera

Now, there is another part to this case
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condemnation cases. Don't think you ar
fused by this because you are not. I will
to you before it is finally submitted. But
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Should the government, at a later date,
these other lands, it must pay their ma
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project from the beginning includes the taking of certain tracts, but only one of them is taken in the first instance, the owner of the other tracts should not be allowed an increased value for his lands which are ultimately to be taken, any more than the owner of the tract first [267] condemned is entitled to be allowed an increased market value because adjacent lands, not immediately taken, increased in value due to the project improved. The question then is whether the respondents, that is, the landowners, whether their lands were probably within the scope of the project before the time the government was committed to it. If they were not, but were merely adjacent lands, the subsequent enlargement of the project to include them ought not to deprive the respondents of the value added in the meantime by the proximity of the improvement. If, on the other hand, they were, the government ought not to pay any increase in value arising from the known fact that the lands probably would be condemned. The owners ought not to gain by speculating on probable increase in value due to the government's activity. If in this case the landowners' lands were, at the date of the authorizing act, clearly within the confines of the project, the landowners were entitled to no enhancement in value due to the fact that their lands should be taken. If they were within the area where they were likely to be taken for the project, but might not be, the owners are not entitled, if ultimately taken, to an increment of value calculated on the theory that if they had not been taken they would have been more [268] valuable by reason of their proximity to the land taken.

Now, your verdict in this case must be unanimous, that is, it must be the verdict of each juror. You can't arrive at your verdict, as I have explained, by taking a high figure and a low figure. You can't arrive at your verdict by any other method than each juror making up his or her mind what the verdict should be. It is the idea of the law that 12 disinterested citizens can take a given set of facts, by thinking them over individually and discussing them collectively, they can arrive at a fair verdict and I am sure you can do it in this case.

Under the law, in the trial of cases in a federal court, it is the privilege and sometime the duty of a trial judge to

comment on the evidence. I don't know that I shall do that in this case. I may or I may not, but if I should comment on the evidence, you are not to accept what I may say as all of the evidence or all of the important evidence; you are not to accept what I may say as necessarily true. You are the triers of the facts and it will be for you to decide what the evidence is and what reasonable inferences may be drawn from it.

[269] I certainly have no interest in this case whatsoever except to see that a fair and just judgment is entered on the records of this court. This court is the most important thing in the world, but in order to enter that judgment, as a fair and just judgment, I must depend upon you to return a fair and just verdict. I will enter the judgment, but you will decide the case, you will decide what the judgment will be. Consequently, each of you carries with you into the jury room the integrity of this court. I am sure, and I feel confident, that each of you will discharge that trust properly. Consider the case, as I say, only from the standpoint of looking at it with complete detachment and objectively, without any attempt to reward unjustly the landowner, or to withhold on behalf of the United States a just award to the landowner. I am confident that you will do that.

Elect one of your number foreman and the foreman will sign the verdict for the jury.

Now, I am going to attempt, if I may, to clarify this matter of increased value.

Mr. Marshal, will you turn this blackboard around, please, for me.

[270] (Reporter's note: The Court made certain drawings on the blackboard.)

The Court: I am not drawing these things except just as a matter of showing the relation of these lands to each other. You have pictures and maps and you should take them to the jury room and give them consideration.

Let us assume that here is the whole land taken, 256 acres taken on the 18th of April 1962, and what we want to know is what was the value of that land on that date, for its highest and best use and purpose, which was a farm. You are not to take into consideration any speculative value. It is

not to have an enhanced value by reason of the possibility of the dam going in. I think the witnesses here testified that the project was really first, its first inception was back in 1938, when the first act or something in connection with these developments was passed. Of course, there was possibly speculation, but it is with the idea that you are not to speculate and fix on that farm a value as being made into a park or being made into a lake or anything else, but what was it worth on the date it was taken for farming purposes? Now, that is what you have got to decide.

[271] I will give you these figures directly and I am going to give you pads so you can write them down, just what these witnesses all testified to. That is what we start with.

Now, the landowner says that this 78 acres was not in contemplation of being taken at the time the project was fixed and they were going to take the rest of it. So, consequently, he is entitled to any increase in value of this property by reason of the development. Now, the law is this. Let us assume—let us take an extreme case. Let us say here is a tract of land (indicating), and here is another tract (indicating) and over here is another tract of land (indicating). I will use an extreme case. And the government comes in and says it is going to take that tract of land there and later takes both of them. If it is within the contemplation or reasonable, as I have read that to you, probability, when they take this if it is within probability that they will take this also, then this is no more valuable than that (indicating), because it was within the reasonable probability that they would take that, even though they said they were only going to take this, that it was within reasonable probability and known to be such that they would take both of them. [272] And so, consequently, each of them is entitled to the same thing. A man is not entitled to come here and make this—this is enhanced in value by reason of this development but it was known to be within the probability of the taking, that they would both be taken. Now then, here is this farm over here, and so as I say, to summarize it, they are both worth the same thing. You are not to give this man an increased value because of this development. Now, here is a farm over here and this devel-

opment goes in here and this farm becomes worth twice, three times what it was—it may be a similar type of land and everything—because of spending all these millions of dollars in here and making this development, it increased the value of this land. But it could not be said that this land was known to be in the probability of being taken. So, the government later comes over and takes this land, extends its parks or whatever it is and comes over and takes this man's farm. This man, then, where it was not to be within the reasonable probability is entitled to whatever his increased value is.

In other words, we know that all developments—you can't keep everything, hold everything back to the time of the taking, because as the development goes in, all things generally are going to increase in [273] value. And the government later comes over and takes it. He is entitled to fix the reasonable market value then on the date of the taking, even though it was enhanced by the development.

Now, Mr. Reynolds said that this 78 acres was not within the probability of being taken, it was not known to be within the probability of being taken at the time it was taken. So, consequently, admitting that it was enhanced in value by reason of the development, he is entitled to the increase, he is entitled to its actual market value at that time.

The government, on the other hand, says it was right there in the valley, all together, known to be within the reasonable probability of being taken, and that this should not be awarded on this, any more than the other people, this part that was taken at that time. Now, that is what this increment, that is what this increase in value, is.

The United States offers the testimony of Mr. Bohrer, who says back in '58, '59, it was all taken, this was made into a ramp and into a recreation area. It was all taken at the same time and that it was all within the reasonable probability of being taken when they first started on the development.

[274] The witnesses for Mr. Reynolds, on the other hand, say it had nothing to do with the rest of it, that all of this came on as an afterthought when they decided to put in a recreation park after they got this other thing started.

And this is what this business of increased value is when I have given you those instructions.

(Reporter's note: The Court returned to be bench.)

The Court: Now, Mr. Marshal, I want you to hand the jurors these pads and pencils and you can just write down—I am going to run down this evidence.

The landowner, as I say, had the burden of proof and offered the testimony of various witnesses. The first witness for the landowner was Mr. James Armes, who testified something about the land and that there was 41 acres of bottom land there. He didn't undertake to place any value on this land, as I now recall it.

The first witness who placed a value on the land was Mr. Charles Whittle and Mr. Whittle said that in his judgment this farm, the part that was taken, was worth $35,000 as a farm and that the 78 acres, which as I say, that is the issue, whether or not it was [275] known that it would probably be taken at the time of the taking of the other land, at the time of the arrangement to take the other land—Mr. Whittle said that he believed that the land had been enhanced in value, the 78 acres, $45,000; in other words, that the improvement in the land—I believe Mr. Whittle made a correction there—maybe I was in error but I understood him to say first it was 35,000 and later he reduced that to 30,000.

Mr. Francis: That's correct.

The Court: —and that the land with the enhanced value was worth $75,000 and that the enhanced value by reason of the taking was 45,000, which was $45,000 more than the 30,000 which he placed as the value on the farm; and that the 148 acres remaining had a value of $14,800 at the time of taking.

The next witness who testified was Mr. Clyde Webb, who gave you his qualifications and his understanding of the land. He had been a public official over there for several years, off and on, was an owner of land, and kept up with the sale of land. He gave you a figure that the farm, just as a farm, was worth $29,550, the part taken, that is, the 256 acres; and that the enhancement in value by reason of the taking was $97,950, or a total with the enhancement of $127,500.

[276] Mr. Gus Parsley gave you his qualifications and his knowledge of land values and the fact that he, himself, owned considerable acreage, his father owned considerable acreage, and he had firsthand knowledge of the situation there with reference to the type and kind of soil, the land, and that the farm, itself, not considering any increase or increment was worth $33,400 and that with the increase was worth $153,000.

Now, I believe they were all the witnesses for the landowner. They all gave you their experence and their knowledge and their having been upon the land, knowing about it.

Then came the witnesses for the United States. The first one was Mr. Bohrer, who testified that the first authorization of this general development idea was June the 28th, 1938, and that the project was approved for construction in January 1959, designated March the 2nd, 1959, approved October the 1st, 1959, and that this 78 acres lying approximately within the valley there, and its proximity to the land, was contemplated to be taken at all times and known to be such because of its proximity to the dam and lake, for ramp purposes, which were necessary, for development as a recreation area, it was known to be within the probability of being taken with [277] the rest of it and that it was taken with the rest of it when the declaration of taking was filed.

The next witness was Doctor Whittle, who qualified as an hydraulic engineer and he gave you the height of the water and the possibility of flooding and so forth with reference to this flowage easement.

The next witness for the United States was Mr. Cain, a real estate man, appraiser. He gave you his qualifications and his study of the situation, his experience as an appraiser, and he testified that the whole property, the whole 420 acres, had a value of $21,500 and that the remaining tract, after the taking, was $13,700, the value of the property taken was $7,800, plus 36 acres on the other side there was worth $1,100, making a total of $8,900, which he said was the amount the Government should be required to pay in this case.

So that, generally, according to my record, covers the evidence. As I say, they testified to a great many things, but very briefly those are the figures that were given.

Now, members of the jury, in order to assist you, I have prepared here what are known [278] as interrogatories—a high-sounding phrase, but doesn't mean anything but a couple of questions.

This Interrogatory No. 1, involving this increase business, says: Do you believe that the 78 acres of land which was later developed by the government as a recreation area and ramp were probably within the scope of the project from the time the government was committed to build the dam and it was a known fact that this 78 acres probably would be condemned?

Answer *yes* or *no*. If your answer is *yes*, you need not answer Interrogatory No. 2. In other words, if you believe it was within the probable scope of the development, your answer would be *yes*. You need not answer No. 2. If you believe it was not, then your answer would be *no* and you would have to answer the second: If your answer to Interrogatory No. 1 is *no*, then state what amount of money that you believe the landowner is entitled to receive by reason of the increment, if any, in value of these 78 acres resulting from the building of the dam and the improvements incident thereto? Now that limits it to the 78 acres alone. Fill in there whatever sum you think it increased what its value was at the time of taking by reason of the development, if you [279] believe that it was not within the scope, reasonable scope, known to be of the project.

Then, here is a verdict, form of verdict—gives the style of the case—"We, the jury, find for the landowner ...." Just set down one figure. "Of this sum, we find that ..... dollars is the amount of money by which the 78 acres was enhanced in value by reason of the dam and improvement." Fill in there the sum, if any, that you filled in over here in answer to that second question. If you do not believe it went in, then you must write in there "none", or your interrogatory over here would show. If you answered "yes" then, of course, you don't fill out anything. I think you understand that. I am sure you do. If not, I will be glad to explain it further.

Elect one of your number foreman and let the foreman sign the verdict for the jury.

Now, Mr. District Attorney, you may approach the bench, gentlemen.

(Reporter's note: The following occurred at the bench in the immediate presence of the Court and counsel, out of the hearing of the jury:

The Court: Do you have any exceptions, Mr. Rivers?

[280] Mr. Rivers: Yes, sir, on the failure of the Court to give our proposed Instruction 13, which relates to that the jury won't take into consideration the cost of these proceedings, since costs are not assessed against or paid by the landowner.

The Court: What is that number?

Mr. Rivers: No. 13. And failure to give Instruction No. 14, which relates to the fact that they are not to take interest into consideration since it would be a part of the judgment.

I object to the instruction in the language of the Miller case for the reason that it is error because this should be a question of law and not a question of fact.

I object to Interrogatory No. 1 since I think it is erroneous, it is not the law, and the further fact that it is prejudicial by requiring the jury—by requiring the known fact that this particular tract of 78 acres would be taken.

Object to Interrogatory No. 2 for the same reason.

The verdict that the Court has given to the jury does not separate Tract 203 from 603, which I think should be done.

[281] Mr. Rivers: That is all.

The Court: All right, sir. I am going to state to them about that interest and about that cost, but overrule the other part of it.

Mr. Solomon: If Your Honor pleases, I would like to object to the statement upon the resume of the evidence that Mr. Bohrer, the government's witness, stated that the dam and the recreational area were contemplated at the same time. Of course, it is a factual thing, what the evidence would disclose.

I object further that the jury was instructed on the value as a farm, and that alone, on the value of enhancement, that the jury should not have been instructed as to the value of the farm, but should have been instructed only on enhancement as there was no testimony by the government that this project encompassed the recreational area at its inception, at the outset, as the Court said.

I'm not going to object to Instruction X because I think the court read it.

The Court: I gave it, but I did not read it.

Mr. Solomon: I object to the [282] failure to give Instructions A, B, C, D, and E.

The Court: Overruled.

I assume there is no objection to them taking all of the exhibits with them?

Mr. Rivers: No, sir.

Mr. Solomon: No, sir.

(Thereupon the Colloquy at the Bench Ended)

The Court: Now, members of the jury, as I think I made clear to you, but in order to emphasize it because it deserves emphasis, you are not to take into consideration in fixing the value of this land, you are not to consider any costs to the landowner or any other persons, or any interest. In other words, that is all taken care of by law, so just limit your decision solely to a question of fair and reasonable market value, as I have given you that instruction, and determine the question of enhancement if you believe there is any, as I have instructed you in that connection.

(Reporter's note: The alternate juror was excused by the Court.)

The Court: Now, Mr. Marshal, you may get the exhibits and the jury make take them.

[283] (Reporter's note: The following instructions were requested by the landowner and the landowner objected to the Court's failure to give them:)

"Instruction No. A

"The fair market value of property is the price it will bring when offered for sale by one who desires, but is not obliged to sell, and is bought by one who desires, but is under no necessity, to buy.

"It is not a question of the value of the property to the Government or to the owner. Nor can the value be increased or reduced by an unwillingness to sell it or because the Government needs the particular property; nor because of the proposed construction of the road."

"Instruction No. B

"The Court instructs the jurors that when private property is taken under the exercise of the power of eminent domain the law requires that just compensation be paid to the landowner. Just compensation means a fair and full equivalent for the loss sustained. It would be unjust to the Government if it were required to pay more than the loss sustained by the property owner and it would be unjust to the property owner if he should receive less than his loss."

[284] "Instruction No. C

"The Court instructs the jurors that the compensation to which the owner is entitled is the full and perfect equivalent of the property taken and the damages, if any, inflicted by the taking, in other words, the loss caused to him. This means substantially that the owner shall be put in as good position pecuniarily as he would have been if his property had not been taken. It is not intended that the compensation shall extend beyond the loss of injury.

"Instruction No. D

"The jurors shall consider all uses to which the property may be reasonably adapted with respect to its surroundings and natural advantages, or disadvantages, and shall determine its fair market value at the time of the taking in the light of such uses. The jurors should consider these uses with relation to the existing business, residential, agricultural, or other demands of the community, or such as may by reasonably expected in the immediate future. The uses to which the land is adaptable must be so reasonably probable as to have an effect on the market value of the land at the time of taking. Purely imaginative or speculative value or uses should not be considered."

[285] "Instruction No. E

The court instructs the jurors that in fixing a just compensation for the land taken and for damage to the residue of the defendant's land, the jurors are not limited to the use which the landowners are actually making of the land, but the landowners are entitled to be compensated for the land taken and for the damage to the resi-

due of their land on the basis of the most valuable purpose for which said land is susceptible of being used."

(Reporter's note: The jury retired from the courtroom to consider the case. Subsequently, on the same day, the returned into the courtroom and the following occurred:)

The Court: Did you make a verdict, Mr. Foreman?

The Foreman: Yes, Your Honor.

The Court: Hand in the verdict, please.

Call the jury, Mrs. Harris.

(Reporter's note: The names of the jurors were called by the clerk and all answered.)

The Court: Read the verdict, Mrs. Harris.

[286] (Reporter's note: There was a pause in the proceedings while the verdict was examined by the Court.)

The Court: Members of the jury, you have found in your interrogatories, but you will have to make a verdict also on the amount of money.

Do you understand?

You have found on the question of increment, but you will also have to fix a value on the farm.

The Foreman: Your Honor, on the 78 acres?

The Court: No, on the whole thing. I gave you those figures. I believe you have that on the whole thing. I will let you take this back with you.

(Reporter's note: The jury retired from the courtroom to consider the verdict further. Subsequently, on the same day, the jury returned into the courtroom, and the following occurred:)

The Court: Call the jury, Mrs. Harris.

(Reporter's note: The jury was called by the clerk and all answered.)

[287] The Court: Did you make a verdict, Mr. Foreman?

The Foreman: We have.

The Court: Read the verdict.

The Clerk: "We, the jury, find for the landowners $20,000.

"Of this sum we find that none is the amount of money by which the 78 acres was enhanced in value by reason of the dam and improvement."

Signed "W. F. Wallace, Foreman"

The Court: Now, read the other. Read the interrogatory.

On the Interrogatory No. 1: "Do you believe that the 78 acres of land which was later developed by the government as a recreational area and a ramp was probably within the scope of the government from the time the government was committed to build the dam and it was a known fact that this 78 acres probably would be condemned? Answer *yes*."

And it is signed by Mr. Wallace, as the foreman.

Let the verdict be entered.

Mr. Francis: If Your Honor please, we would like to make a motion when we have the [288] opportunity.

The Court: Approach the bench.

(Reporter's note: The following occurred at the bench in the immediate presence of counsel and the Court, out of the hearing of the jurors:

Mr. Francis: I would like to make a motion to set aside the verdict as contrary to the law and evidence and on the basis that the Court should have as a matter of law instructed the jury to value the property at its enhanced value at the date of taking, April the 18th, 1962, under the evidence that was submitted in this case; that the only evidence that the government offered was by Mr. Bohrer, which we feel did not support the case that would knock out the enhanced value or make the enhanced value rather a question of fact; in other words, it should have reverted back as a matter of law, without any question of fact and law.

The other exception under this is that the jury did not value each tract. They did not give a verdict to Tract 603, 603 E and E-2, and 203. They gave the all encompassing verdict which we believe to be wrong at this point. Those are my exceptions.

[289] The Court: Do you want to be heard further?

Mr. Francis: Nothing.

The Court: Let it be overruled.

Thereupon the Colloquy at the Bench Ended)

* * * * * * * * * *

Trial Order

(Filed May 23, 1967.)

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT BOWLING GREEN

CIVIL NO. 857

UNITED STATES OF AMERICA, *Plaintiff*,

v.

811.92 ACRES OF LAND, MORE OR LESS, SITUATE IN EDMONSON AND HART COUNTIES, STATE OF KENTUCKY, AND WILLIAM R. PADGETT, ET AL., *Defendants*

On Thursday, May 18, 1967, at 4:35 P.M., this case was called for a jury trial pursuant to order dated April 17, 1967. There appeared Ernest W. Rivers, United States Attorney, and the landowner, W. G. Reynolds, was present by counsel, Erwin Solomon, J. David Francis and Whayne Priest.

It appearing from the record that briefs had heretofore been filed by the parties on the question of enhancement, the court took the matter under advisement. By agreement of the parties, the following jury:

Dillard Williams	W. P. Chastain
Marvin Adams	R. S. Wingfield
F. R. McKeel	L. D. Britt, J.
Mrs. Austin Calvert	F. W. Wallace
Mrs. Jessie Hutcherson	Harold Tynes
Mrs Margaret Alexander	A. E. Kilbourne

Alternates

Mrs. Ruth Long Mrs. Margaret Davenport

was selected and impaneled but not sworn to try the case. Time for adjournment having arrived, the jury was admonished and Court adjourned until Friday, May 19, 1967, at 9:00 A.M.

On Friday, May 19, 1967, court convened at 9:00 A.M. with all parties present as on May 18, 1967. The court

heard counsel at the bench out of the hearing of the jury on the question of enhancement and, it appearing that the parties desired to offer proof, the jury retired from the courtroom.

Evidence was then offered by the United States and the landowner. The court heard arguments of counsel and being advised ruled that the landowner would have to limit his evidence to the value of the property on the date of the taking, less any enhancement it might have received by reason of this development which was reasonably anticipated; the parties then requested a recess, which was granted. At 11:05 A.M., the parties announced ready for trial and the jury was sworn. An opening statement was made for the landowners by Mr. Francis and for the United States by Mr. Rivers. At the bench in the presence, but out of the hearing of the jury, the court made a further ruling that the question of enhancement should be decided by the jury.

Mr. Francis then made a further statement to the jury in behalf of the landowner and Mr. Rivers made a further statement in behalf of the United States.

Evidence for the landowners was introduced and the noon hour having arrived, the jury was admonished and court recessed until 1:30 P.M. Court reconvened at 1:30 P.M. and evidence for the landowners was continued and concluded. Evidence for the United States was introduced and concluded. Rebuttal evidence was presented by the landowners. Thereupon the United States renewed its request that all evidence on enhancement involved be excluded. The motion was overruled.

Time for adjournment having arrived, court adjourned until Monday, May 22, 1967, at 9:00 A.M.

In chambers on Monday, May 22, 1967, at 8:50 A.M., Mr. Rivers. U. S. Attorney, in the presence of counsel for the landowner, moved that R. S. Wingfield, a juror, be discharged from further service in the case. Counsel for the landowner objected. The court heard counsel and being advised sustained the motion.

Court reconvened on Monday, May 22, 1967, at 9:00 A.M., with all parties and the jury present as on May 19, 1967. The Court directed that juror, R. S. Wingfield, be excused

from further service in this case and that the Deputy Clerk call the first alternate juror, Mrs. Ruth Long, to serve on the panel in his place.

Closing arguments were made by Mr. Rivers for the United States and by Mr. Francis for the landowners.

The Court instructed the jury, the alternate juror was discharged and the jury retired to consider the case at 10:45 A.M.

At 11:30 A.M., the jury returned into court and in the presence of the landowner's counsel and the U.S. Attorney, announced that it had made a verdict.

It appearing to the court that the interrogatory had been answered but that no amount was filled in on the verdict, the court directed the jury to return to the jury room.

The jury returned into court at 12 noon and in the presence of the landowner's counsel and the United States Attorney, the following verdict was reported and read by the Deputy Clerk:

> "We, the jury find for the landowner $20,000. Of this sum we find that None is the amount of money by which the 78 acres was enhanced in value by reason of the dam and improvement.
> May 22, 1967 S/F. W. Wallace, Foreman."

The Court read the interrogatory 1:

> "Do you believe that the 78 acres of land which was later developed by the Government as a recreation area and ramp were probably within the scope of the project from the time the Government was committed to build the dam and it was a known fact that this 78 number of acres probably would be condemned? Answer 'Yes' or 'No.'
> Yes ..x.....
> No .....
> "

MAC SWINFORD,
Judge.

Judgment

(Filed June 5, 1967.)

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT BOWLING GREEN

Civil No. 857

UNITED STATES OF AMERICA, *Plaintiff*,

v.

811.92 ACRES OF LAND, MORE OR LESS, SITUATE IN EDMONSON AND HART COUNTIES. STATE OF KENTUCKY, AND WILLIAM R. PADGETT, ET AL., *Defendants*

This case having come on for hearing before the Court with a jury on May 19 and 22, 1967, and the jury having determined just compensation for the taking by the United States of the surface interest in Tracts 203, 603, 603-E and 603-E2,

IT IS THEREFORE ORDERED AND ADJUDGED by the Court that:

1. The defendants, W. G. Reynolds and Mary N. Reynolds, his wife, were the owners of the surface interest in Tracts 203, 603, 603-E and 603-E2 immediately prior to the filing of the declaration of taking and complaint in condemnation, and that immediately thereafter and now the United States of America is the owner in fee simple of Tracts 203 and 603 and the owner of easements over Tracts 603-E and 603-E2.

2. The sum of $20,000.00, together with six per cent interest (6%) on the deficiency sum of $5,000.00, due from April 18, 1962 until the date of payment into court by the United States of America is just compensation and full satisfaction to the defendants for the taking of Tracts 203, 603, 603-E and 603-E2.

3. The United States shall cause to be deposited into the registry of the court with respect to said tracts, the

deficiency sum of $5,000.00, plus the interest thereon as heretofore set out.

Entered this 2nd day of June, 1967.

Judge, U. S. District Court,
Western District of Kentucky.

APPROVED:

ERNEST W. RIVERS
United States Attorney.

Notice of Appeal

(Filed June 22, 1967.)

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT BOWLING GREEN

Civil Action No. 857

UNITED STATES OF AMERICA, *Plaintiff*

v.

811.92 ACRES OF LAND, ETC., STATE OF KENTUCKY and WILLIAM R. PADGETT, ET AL., *Defendants*

TRACTS NOS. 203, 603, 603-E and 603-E2

Notice is hereby given that W. G. Reynolds and wife, Mary N. Reynolds, defendants in this action, hereby appeal to the United States Court of Appeals for the Sixth Circuit the Trial Order and Final Judgment entered in this action on 23 May 1967 and on 5 June 1967, respectively.

ERWIN S. SOLOMON
Erwin S. Solomon
Hot Springs, Virginia

J. DAVID FRANCIS
511 East Tenth Street
Bowling Green, Kentucky 42101

By: WHAYNE C. PRIEST, JR.
Attorneys for Defendants,
W. G. Reynolds and Mary N. Reynolds

[Certificate of Service omitted]

CERTIFIED
6-22-67
LOIS M. HARRIS

Decision of the Court of Appeals

No. 18292

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

APPEAL *from the United States District Court, Western District of Kentucky.*

UNITED STATES OF AMERICA, *Plaintiff-Appellee,*
v.
811.92 ACRES OF LAND, MORE OR LESS, SITUATE IN EDMONSON AND HART COUNTIES, STATE OF KENTUCKY, WILLIAM R. PADGETT, ET AL., TRACTS NOS. 203, 603, 603-E AND 603-E-2, W. G. REYNOLDS AND MARY N. REYNOLDS, *Defendants-Appellants.*

Decided December 9, 1968.

Before: O'SULLIVAN, CELEBREZZE and COMBS, Circuit Judges.

CELEBREZZE, Circuit Judge. This appeal involves the valuation in a condemnation action instituted April 18, 1962 by the United States of America, hereinafter Appellee, against lands owned by W. G. Reynolds and Mary N. Reynolds, hereinafter the Appellants.

Appellants owned two tracts of land which were contained within the 811.92 acres condemned for the Nolin Reservoir Project in Edmonson and Hart Counties, Kentucky. The property was designated Tract 203 and Tract 603-E and E-2. The latter Tract was taken in fee and easement.

The condemnation suit was tried before a jury which granted Appellants $20,000 as just and reasonable compensation for the taking of their land. It is Appellants' contention that misstatements contained within the Court's resume of the evidence greatly prejudiced the jury's decision that 78 acres within Tract 603 were within the scope of the project as defined in *Miller* v. *United States,* 317 U.S. 369, 63 S.Ct. 276 (1943), rehearing denied 318 U.S. 798.

In 1938 Congress authorized the construction of the Nolin Reservoir under the Flood Control Act. P.L. 761, 75th Congress. Funds were not appropriated for the planning of the project until July of 1956. Two years later on July

14, 1958, the Chief of Engineers approved a General Design Memorandum which contained all phases of construction and land acquisition. It was brought out through testimony that these memorandums generally contemplate the construction of appropriate recreational areas around reservoir sites. Neither this document nor any other design memorandum was entered into evidence.

Congress appropriated construction funds on October 12, 1958, but the project was not commenced until January of 1959.

Tract No. 603, the valuation of which is in dispute here, was purchased by Appellants in two separate transactions —one in October of 1959 and the other in January of 1960. The part of this Tract lying below the 566-foot level was to be inundated by the reservoir's water. No question is raised concerning its valuation, for it was admittedly within the scope of the project. The controversy revolves around the 78 acres contained within Tract 603 which was taken for public recreational purposes. This specific area was first designated in Design Memorandum No. 8, approved October 1, 1959. However, it was not contained within the memorandum as originally submitted on June 17, 1959. Appellants contend that its addition was merely an afterthought. The question the District Court placed before the jury was whether this property was probably within the scope of the project from the time the Government was committed to it and whether it was known that it probably would be condemned.

Prior to the swearing in of the jury the Court and the parties agreed that the rule set forth in *Miller* v. *United States*, 317 U.S. 369, 63 S.Ct. 276 (1943), rehearing denied 318 U.S. 798, would govern any questions relating to enhanced value. It was at this time that Appellee placed Max Bohrer on the stand in an attempt to have the Court rule that no evidence of enhancement could be placed before the jury. Mr. Bohrer had been an employee of the Corps of Engineers for twenty-four years and presently was Assistant Chief of the Real Estate Division, in the District Office. Appellants introduced three witnesses to refute the testimony of Max Bohrer.

The Court decided that it was faced with "a mixed question of law and fact . . . [which] . . . addresses itself to

the Court to be determined before we go into the trial of the case." The Court then determined that under *Miller* v. *United States*, 317 U.S. 369, 63 S.Ct. 276 (1943), rehearing denied 318 U.S. 798, the property was within the scope of the project from the beginning. Therefore the evidence of both parties would be limited to the value of the property without any enhancement. After a short recess, the jury was called and sworn to try the case. During the opening statements the Court called the attorneys to the bench and discussed its prior interpretation of the *Miller* case. At this point the Court reversed itself and decided that the mixed question of fact and law concerning enhanced value should be submitted to the jury. The Court then permitted the attorneys to supplement their original statements to the jury.

Appellee takes issue with this interpretation of *Miller*. It does not believe the Court should have submitted to the jury the question of whether the 78 acres were within the scope of the project from the beginning of the Government's commitment to it. It would have this Court believe that under Rule 71A (h), Federal Rules of Civil Procedure, only a narrowly construed issue of just compensation may be submitted to the jury or commission. The Rule states that "... all other issues shall be tried by the court." Federal Rule of Civil Procedure 71A (h).

In *United States* v. *Certain Lands, etc.*, 144 F.Supp. 206 (1956) the court held that the issue of just compensation should not be interpreted as meaning that the jury's function is to be restricted solely to dollar amounts. The jury's province must be broad enough to weigh evidence which relates directly to the issue of just compensation. Courts have repeatedly held that the question of whether or not a piece of property was within the scope of a project at a specific time is a proper one to be submitted to the jury. *United States* v. *Miller*, 317 U.S. 369, 63 S.Ct. 276 (1943), rehearing denied 318 U.S. 798, *cf. John L. Roper Lumber Co.* v. *United States*, 150 F.2d 329 (4th Cir. 1945). In *United States* v. *Crance*, 341 F.2d 161 (8th Cir. 1965), it was only by agreement that the District Court, rather than the jury, was to decide whether the land was within the scope of the project as set forth in *United States* v. *Miller*, 317 U.S. 369, 63 S.Ct. 276 (1943), rehearing denied 318

U.S. 798. There only the monetary issue of just compensation was submitted to the jury.

In the case before this Court there was no such agreement. Therefore, the issue of just compensation which was submitted to the jury properly contained the question relating to the scope of the project. The Court dealt with this question in its first interrogatory to the jury.[1] The Court specifically wanted the jury to decide whether or not a recreational area was within the scope of the project prior to its dealing with the monetary aspects. If recreational areas were so contemplated, then the landowner would not be entitled to any enhanced value due to the project. *United States* v. *Miller*, 317 U.S. 369, 63 S.Ct. 276 (1943), rehearing denied 318 U.S. 798, *United States* v. *First Pyramid Life Insurance Company of America*, 382 F.2d 804 (8th Cir. 1967), *United States* v. *Crance*, 341 F.2d 161 (8th Cir. 1965). Since the jury decided that the 78 acre tract was within the scope of the project from the beginning, it did not include in its award any value due to enhancement. Unless there is other error present, this Court will not overturn the verdict of the jury based on substantial evidence. *Lavender* v. *Kurn*, 327 U.S. 646, 654 (1945), *Jayson* v. *United States*, 294 F.2d 808 (5th Cir. 1961).

On appeal this Court is primarily concerned with the propriety of the trial Court's instructions. The question arises as to whether the Court invaded the province of the jury by referring to certain facts contained within the testimony of the Government's chief witness Max Bohrer, taken outside of the presence of the jury.

Appellants contend that the Court's resume of Max Bohrer's testimony greatly prejudiced them in the eyes of

---

[1] "Do you believe that the 78 acres of land which was later developed by the Government as a recreation area and ramp were probably within the scope of the project from the time the Government was committed to build the dam and it was a known fact that this 78 number of acres probably would be condemned? Answer 'Yes' or 'No'.

Yes X

No ....."

the jury.[2] They point particularly to the section where the witness was to have said that, "it was all within the reasonable probability of being taken when they first started the project." It is Appellants' contention that Mr. Bohrer only stated that the residents should have known that the 78 acre parcel was going to be taken by the Government because it was adjacent to the land to be taken for the reservoir.

This Court is of the opinion that Appellants were prejudiced by the Court's summation of Mr. Bohrer's testimony. The record disclosed that in his testimony before the jury Mr. Bohrer stated that the Corps of Engineers' regulations which have been in effect since 1944 provided for the acquisition of recreational areas.[3] He stated that when a project is authorized it is contemplated that it will include recreational areas. He went on to say that the general design memorandum normally planned for access points. However, Mr. Bohrer did not state that the Nolin Reservoir project, specifically, contemplated recreational areas, nor did he say that all of the property was within the reasonable probability of being taken when the Government started the project.

The record reveals that Max Bohrer and other witnesses were examined both in and outside the presence of the jury.

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[2] In summarizing Max Bohrer's testimony the Court stated:

> "The United States offers the testimony of Mr. Bohrer, who says back in '58, '59, it was all taken, this was made into a ramp and into a recreation area. It was all taken at the same time and that *it was all within the reasonable probability of being taken when they first started on the development.*" (Emphasis added)

[3] These regulations may be similar to those referred to in *Crance v. United States*, 341 F.2d 161, 162 (8th Cir. 1965). The significant factor here was that the project contemplated recreational areas from its very inception. With reasonable certainty one could predict that land lying beyond the perimeter of the reservoir would have to be taken for recreational purposes. The Court reasoned that since the Crance property abutted the reservoir line and recreational areas had been contemplated, it was within the sphere of probable acquisition as defined in the *Miller* decision. *United States v. Miller*, 317 U.S. 369, 63 S.Ct. 276 (1943), rehearing denied 318 U.S. 798.

It also discloses that part of the testimony referred to by the Court in its resume was taken outside the presence of the jury.[4] The part of the resume being questioned by Appellants introduced new evidence to the jury.

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[4] The record reveals that there was a preliminary motion to be taken up prior to going into the trial. Appellee assured the Court that if allowed to put on its proof, it would show that the question of enhancement should be decided by the Court. The Court decided to allow the testimony, but excluded the jury from the courtroom. It was at this time that Max Bohrer was first called to the stand. Relevant questions and answers contained in his testimony are as follows:

> "Q. Now, do the regulations of the Corps of Engineers make any provision for public use and access areas on these particular type projects?
>
> A. Well, in the General Design Memorandum, which was approved by the Chief of Engineers in Washington, on the 14th day of July 1958, the General Design Memorandum contemplated the acquisition of land and the construction of appropriate access facilities around the reservoir."
>
> • • •
>
> "Q. • • • My question is, did you have any knowledge, representing the Corps of Engineers, that the plans to acquire this recreational area known as Site 7 was disclosed to the public in any way or to the landowner, prior to the date of March 31st, 1961?
>
> "A. Well, of course, because this land is adjacent to the reservoir, it is in the category of what I would call likely to be taken for the project. As I said before, the planning goes on from the beginning to the end of this project and all land that is adjoining the reservoir or in the immediate vicinity thereof is susceptible to acquisition by the government until the project is completed."
>
> COURT; • • •
>
> "Q. Now, Mr. Bohrer, the question is whether the respondent landowners, that is the owners of this land in question, were probably within the scope of the project from the time the government was committed to it. • • •
>
> "A. These lands were included within the scope of the project in our General Design Memorandum and—because part of the area we are talking about is required by flood control."

This testimony was made with specific reference to the 78 acre tract. It did not refer to vague or general Corps policies. The

The Court's summary of Mr. Bohrer's testimony related to the material question of whether the 78 acres were within the scope of the project from the time the Government became committed to it.[5] This Court is not trying to limit the trial Court's right to summarize the facts—especially in a complex situation as was here presented. *Minner* v. *United States,* 57 F.2d 506 (10th Cir. 1932), *Rudd* v. *United States,* 173 F. 912, 914 (8th Cir. 1909). However a judge should be very careful and exacting in exercising this function. He is not to assume the role of a witness nor is he to introduce new evidence. *Quercia* v. *United States,* 289 U.S. 466 (1933), *Benes* v. *United States,* 276 F. 2d 99 (6th Cir. 1960). The jurors must be allowed to exercise their independent judgment upon the facts which are presented to them. The Court's inclusion of its review of evidential matters taken outside the presence of the jury in its comments to the jury represents reversible error.

The Court cautioned the jury that they were not to accept what he said as necessarily true nor were they to consider it as all of the evidence. He assured them that they were the ultimate triers of fact and that it was up to them to decide what the evidence was and what the inferences were to be drawn from it. Such an expression did not cure error in the charge pertaining to Mr. Bohrer's testimony. *Quercia* v. *United States,* 289 U.S. 466 (1932), *Nunley* v. *Pettway Oil Company,* 346 F.2d 95 (6th Cir. 1965).

Appellants also claim error on several other grounds. They claim that the jury should have been instructed to bring in separate verdicts for each tract of land. No objection was raised concerning this particular point until after the jury had returned with a single verdict. The trial

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content is similar to the Court's resume which proceeded in a chronological order and dealt separately with each witness as he took the stand. The order in which the Court's resume deals with the witnesses is the same as they fall within the transcript of the proceeding. Where the Court has dealt with a witness twice, the witness has appeared both in and out of the jury's presence. It should be noted that the part of the resume which is questioned was the first of two references to Max Bohrer.

[5] See note 2.

Court was not given the opportunity to correct itself, if error existed. It is the opinion of this Court that since Appellants enjoyed the benefit of the instruction as it stood, they are not now entitled to bring it up on appeal. *Welders Supply, Inc.* v. *American Employers Insurance Company,* 358 F.2d 593 (6th Cir. 1966).

Appellants also contend that the Court erred by not giving their requested instructions A, B, C, and D. This Court has held before in similar situations and so holds here that error will not result in such a refusal where the trial Court's instructions covered substantially the same thing. *Cobb* v. *Union Railway Co.,* 318 F.2d 33 (6th Cir. 1963), cert. den. 375 U.S. 945, *U.S. Fidelity & Guaranty Co.* v. *Canate,* 257 F.2d 138 (6th Cir. 1958).

Lastly, the Appellants contend that they were prejudiced when the trial Court replaced one of the jurors with an alternate. The juror, R. S. Wingfield, had been seen talking with one of the witnesses. Although there was no actual showing of misconduct between the witness and the juror, the Court felt that the encounter raised a question of impropriety. We do not see how the Appellants were prejudiced by the Court's use of discretion. *Larson* v. *General Motors Corporation,* 148 F.2d 319 (2d Cir. 1945), *cf. Jayson* v. *United States,* 294 F.2d 808 (5th Cir. 1961). Alternate jurors were available and the Court felt there was sufficient reason to remove Wingfield to insure a just decision.

The judgment of the District Court is reversed and the case is remanded for further proceedings.

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 18292

UNITED STATES OF AMERICA, *Appellant*

v.

811.92 ACRES OF LAND, MORE OR LESS, SITUATE IN EDMONSON AND HART COUNTIES, STATE OF KENTUCKY, WILLIAM R. PADGETT, ET AL., TRACTS NOS. 203, 603, 603-E AND 603-E-2, W. G. REYNOLDS AND MARY N. REYNOLDS, *Appellees*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF KENTUCKY

Petition of the United States for Rehearing

The United States of America, appellant, presents this petition for rehearing for the reasons stated below.

I

THIS COURT MISCONCEIVES RULE 71A(h)

A. *The opinion squarely conflicts with the proper rule stated in Wardy case, ignored by this Court.*—This Court held that the question of "scope of the project" was properly submitted to the jury. Such holding controverts the plain language of Rule 71A(h), F.R.Civ.P.

The correct rule is most cogently displayed in *Wardy* v. *United States* (C.A. 5, No. 25718, Oct. 25, 1968) not yet reported, as follows:

> The question was whether appellants' "lands were probably within the scope of the project from the time the Government was committed to it." *Miller, supra* at 377. Appellants contend that the jury should have been allowed to answer this question. Under rule 71A(h) the jury's function is limited to determining "just compensation." It is the duty of the court to decide the legal issues, as well as all other fact issues. [Citations omitted.] *Thus, instead of infringing on the jury's functions, the judge merely decided a legal question which limited the factors necessary to the*

determination of "just compensation." [Emphasis supplied.]

There is no doubt that the Fifth Circuit has correctly described the obvious meaning of Rule 71A(h). The concept of the rule was straightforward: all issues, legal and factual, are to be decided by the district court except one —just compensation. 7 Moore, *Federal Practice* (2d ed. 1968) sec. 71A.90[3] p. 2799. The opinion herein usurps the power of the district court to exercise its proper function under Rule 71A(h) by expanding the function of the jury (or a commission) beyond the limits plainly spelled out in the rule. See: *Scott Lumber Company* v. *United States,* 390 F.2d 388, 392 (C.A. 9, 1968); *United States* v. *91.69 Acres in Oconee County,* 334 F.2d 229, 231 (C.A. 4, 1964).

B. *The opinion misuses the Miller case.*—This Court erroneously cites *United States* v. *Miller,* 317 U.S. 369 (1943), to justify its contention that the jury has some other function than that stated by Rule 71A(h). *Miller* cannot support this Court's construction of Rule 71A(h) for three reasons: (1) the case arose under, and was governed by, California procedure; (2) the case arose long before the enactment of Rule 71A(h); and, most important, (3) the district judge in fact did *not* submit the question of the scope of the project to the jury. This Court thus misstates the procedure followed in *Miller* to justify the district court's action in the present case.

In *Miller,* the district court prevented overt inclusion of enhancement in valuation testimony by excluding evidence (317 U.S. at 372) and, thereafter, to prevent covert inclusion thereof, charged the jury to ignore any increment of value due to enhancement (317 U.S. at 373, 379). The district court in *Miller* did not give the jury the option of including or excluding enhancement. Rather, it stated the rule in its instructions to show why such an increment of value was excluded by the court and should not be considered by the jury in its deliberations. Thus *Miller* controverts, rather than supports, this Court's decision.

C. *The opinion is wrong in asserting that "courts have repeatedly held" that the issue of the scope of the*

project is for the jury.—Besides its mistaken reliance on *Miller*, this Court also cites *John L. Roper Lumber Co. v. United States*, 150 F.2d 329 (C.A. 4, 1945), in support of its position. Both *Roper* and *Scott* v. *United States*, 146 F.2d 131 (C.A. 5, 1944), which Roper cites, were decided prior to Rule 71A(h) being enacted. Since Rule 71A(h) has been operative, the Fourth Circuit has stated, in *United States* v. *91.69 Acres in Oconee County*, 334 F.2d 229, 231 (1964):

> We think it desirable, however, to point out that the court should limit the Commission [or jury] to finding the value of the land proposed to be taken.

And the Fifth Circuit has emasculated its earlier *Scott* case by its plain holding in *Wardy, supra.* Clearly, both *Roper* and *Scott* are no longer good law and do not support this Court's assertion.

The only other authority cited by this Court to support its view of the meaning of Rule 71A(h), *United States* v. *Certain Lands in the Townships of Raritan and Woodbridge, Middlesex County, N.J.*, 144 F.Supp. 206 (D. N.J. 1956), is simply inapposite. It was a road taking case presenting the substantially different question of necessity for a substitute facility. Moreover, while the case was modified on appeal, 246 F.2d 823 (C.A. 3, 1957), that question was not even in issue in the appellate court. In any event, the opinion of one district court cannot outweigh the decisions of every federal circuit which has ruled on the meaning of Rule 71A(h).[1]

The discussion above shows, then, that this Court's notion of what may be submitted to a jury (or a commission) under Rule 71A(h) is novel and contrary to every reasoned federal appellate authority.

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[1] We note that the enhancement problem is also currently pending in the Third Circuit in *United States* v. *958.68 Acres in Mercer County, Pa. (Burdette)*, No. 17504. The district court concluded there—correctly, we maintain—that it, not the jury, should decide the factors necessary to the determination of just compensation.

II

This Court's Action Contradicts the Supreme Court's Holding in Miller

Miller declares (317 U.S. at 377): "The owners ought not to gain by speculating on probable increase in value due to the Government's activities."

A. *This Court ignores the holding of Miller.*—The basic holding of *Miller* is nowhere applied to the admitted facts of this case. The holding of the *Miller* case is simply that any and all enhancement in value due to the same project for which the tract is taken will not be included in the compensation paid by the Federal Government in the exercise of its power of eminent domain. The Supreme Court detailed two possible situations falling under this rule: (1) where the lands were clearly within the confines of the project at its inception and the condemnation was simply delayed; and (2) where the lands were within the area where they were likely to be taken, but might not be taken.[2] 317 U.S. at 379. The general area encompassed by the project thus became the "area of influence" where any land could be taken without payment of enhanced value. See *Shoemaker* v. *United States*, 147 U.S. 282, 303-305 (1893). This "area of influence" obviously included any location where an increase in property value was caused by the project. This is what "scope of the project" means. It does not hinge on what the public may think and hence it is plain error to submit to the jury the question, in the words of this Court, "whether it was known that it [the particular tract] would probably be condemned." That fact is irrelevant to the *Miller* rule. The rule does not hinge on public belief, knowledge or speculation, or what the jury or court may think it should have been.

B. *This Court manufactures its own rule, contrary to Miller.*—This Court does not apply the *Miller* rule in its opinion in the instant case. Instead, it manufactures its own rule requiring evidence on the part of the Government to prevent the payment of the enhanced value due

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[2] The land in *Milller* came under this latter category.

to this project.[3] The "scope of the project" criterion this Court attempts to invoke is in reality a requirement for evidence showing the inclusion of the lands in question in some plan or drawing. The holding is that, without such a showing, enhancement will be payable. Stated affirmatively, this Court's holding is that enhancement resulting from the project for which the particular tract is taken[4] *is* payable absent conviction by a jury that that tract would be taken, according to plan, in the early stages of the project. The Supreme Court in *Miller* never intended such use of the phrase. The phrase, "scope of the project," was merely a practical description of the location of the lands involved in that case to express the fact that, although not contiguous to the project lands, they were taken for the Shasta Dam project and not for some other project.

C. *The reversal of the judgment contradicts the holding of Miller.*—

1. *This Court has created an artificial, legalistic limitation on the Miller rule by reversing this case.* This Court has focused in its opinion on certain testimony by a government witness, given in part out of hearing of the jury, concerning the specifics of the planning of this project. This Court reversed because it construed the district court's summation to include unwarranted comment. How is this testimony material and relevant? Such testimony concerning specific stages of planning the project seems to be regarded in the opinion as material and relevant as evidence of some legal limitation on the project, i.e., its "scope." *Miller* did not permit such a limitation. Irrelevant matter may have gotten before the jury, but this was not grounds for reversal.

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[3] The inclusion of the specific land in the general plan for the project is not required. *United States* v. *Certain Parcels of Land in Fairfax County (Belle Haven)*, 228 F.2d 280 (C.A. 4, 1955), cert. den., 351 U.S. 907.

[4] No one can deny that this tract is taken for the Nolin Reservoir Project and the Court so stated in the second paragraph of its opinion.

This Court's discussion only obscures the controlling fact that *this* tract was taken for *this* project.

2. *The reversal is based on uncontrovertible testimony that could not prejudice the appellants.* The testimony taken out of hearing of the jury, to which this Court attaches such misplaced significance, is simply that the property in question was within the area of probable taking because it abutted the planned reservoir pool. Such conclusion is irrefutable and therefore not grounds for reversal. The Reynolds could not be prejudiced since they could not question such "evidence." As the court said in *United States* v. *Crance,* 341 F.2d 161, 165 (C.A. 8, 1965). cert. den., 382 U.S. 815:

> The significant factor here is that this project contemplated recreational areas from its very inception and certainly property lying beyond a perimeter of the reservoir would probably be incorporated for recreational purposes if the land acquired for the reservoir alone was not also sufficient for recreational utilization. Since the Crance property abutted the reservoir line, it was within the sphere of probable acquisition for recreational use. Therefore, the rule in Shoemaker v. United States, 147 U.S. 282, 13 S.Ct. 361, 37 L.Ed. 170 (1893) precludes the increment in value in computing just compensation.

The suggestion of this Court that the regulations involved may be merely similar to those in *Crance* plainly is without legal significance. The regulations are general regulations of the United States Corps of Engineers issued pursuant to congressional direction. As such, this Court is duty bound to give them full effect and, of course, to judicially notice. Regarding the testimony as to the regulations and this particular project, such was uncontrovertible statement of fact which the trial court and this Court were obliged to consider, in any event.

The reversal can only mean that some enhancement might have been allowable. *Miller* specifically proscribes such an award.

D. *The opinion conflicts with the Crance application of Miller.*—Additionally, this Court does not even attempt to

distinguish the instant case from *United States* v. *Crance*, 341 F.2d 161 (C.A. 8, 1965), cert. den., 382 U.S. 815. Its discussion of *Crance* merely points out the legal identity between that case and the present case. In truth, the cases are *not* distinguishable in fact or in law. The opinion in this case directly conflicts with that of the Eighth Circuit. In both cases, a tract of land abutting on the new reservoir pool was taken for a feature of the project. Crance was denied enhancement. This Court says Reynolds may get it. Someone is wrong. The *Crance* decision properly discarded the theory this opinion espouses. The court in *Crance* could not have reversed this case. It would have considered the subject testimony irrelevant. See *United States* v. *First Pyramid Life Insurance Co. of America*, 382 F.2d 804 (C.A. 8, 1967).

In summary, the opinion herein contradicts *Miller*, and the cases of other circuits applying the *Miller* rule, in reversing the case and remanding for further proceedings.

III

This Opinion Will Set An Erroneous Precedent In Future Condemnation Cases

A. *This Court's opinion is very important as a precedent.*—There are a large number of condemnation cases now pending in the district courts within this Circuit. Approximately 1,537 non-T.V.A. tracts are now awaiting trial. Additionally, since Congress by Act of September 28, 1968, Pub. L. 90-536, 82 Stat. 885, abrogated the special T.V.A. procedure, Rule 71A will be applicable to *all* condemnation cases. The questions, (1) who determines what factors are necessary to the determination of just compensation, and (2) how the *Miller* rule should be applied in excluding enhancement due to the project, are both important and likely to arise with increasing frequency.

B. *This Court should specifically state why it refuses to follow the rules applied by other circuits.*—It is especially important that this Court consider the cases of other circuits which directly conflict with the opinion in this case, and comment thereon. Thus, the question of who should rule on the enhancement question, judge or jury (or commission), should be spelled out in light of

Wardy v. *United States* (C.A. 5, No. 25718, decided Oct. 25, 1968) not yet reported, and the other opinions which this Court likewise ignores. And the meaning of the *Miller* rule should be thoroughly discussed in comparing this case with *United States* v. *Crance*, 341 F.2d 161 (C.A. 8, 1965), cert. den., 382 U.S. 815, and supporting authorities. Both these questions warrant rehearing or, at least, elaboration of the reasons for this Court's opinion herein.

Conclusion

For the foregoing reasons, the petition for rehearing should be granted.

Respectfully submitted,

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January 1969

Order

[Filed January 24, 1969]

NO. 18,292

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA, *Appellant*,

v.

811.9 ACRES OF LAND, MORE OR LESS, SITUATE IN EDMONSON AND HART COUNTIES, STATE OF KENTUCKY, WILLIAM R. PADGETT, ET AL., TRACTS NOS. 203, 603, 603-E AND 603-E-2, W. G. REYNOLDS AND MARY L. REYNOLDS, *Appellees*.

Before: O'SULLIVAN, CELEBREZZE and COMBS, Circuit Judges.

Upon due consideration, Appellant's petition for rehearing is denied.

It is further ordered that the following changes be made in the slip opinion filed December 9, 1968:

1. Strike out the word "repeatedly" in the seventh line of the first complete paragraph on page four;

2. On page five at the end of the paragraph continued from page four insert an asterisk, i.e. . . . (5th Cir. 1961).*;

3. At the bottom of page five add the following footnote which will be designated by an asterisk:

* After argument of counsel and submission to the Court, *Amen Wardy* v. *United States*, — F. 2d — (5th Cir. 1968) was called to this Court's attention. We do not adhere to the ruling in *Wardy*, supra, for under the facts presented in the principal case the scope of the project is so interrelated with the valuation as to bring it within the issue of just compensation and therefore was a proper matter in jury determination.

ENTERED BY ORDER OF THE COURT

CARL W. REUSS
Clerk

SUPREME COURT OF THE UNITED STATES

No. 88, October Term, 1969

UNITED STATES, *Petitioner*,

v.

W. G. REYNOLDS, ET UX.

ORDER ALLOWING CERTIORARI. Filed October 13, 1969.

The petition herein for a writ of certiorari to the United States Court of Appeals for the Sixth Circuit is granted and the case is placed on the summary calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

☆ U. S. GOVERNMENT PRINTING OFFICE 1969—369030/P.C. 881

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5 Moore, *Federal Practice* (2d ed. 1968) ¶38.32[1] 7
7 Moore, *Federal Practice* (2d ed. 1968) ¶71A.90[3] 7
1 Nichols, *Eminent Domain* (3d ed.) 7

In the Supreme Court of the United States

OCTOBER TERM, 1968

No. —

UNITED STATES OF AMERICA, PETITIONER

v.

W. G. REYNOLDS AND MARY N. REYNOLDS

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

The Solicitor General, on behalf of the United States of America, petitions for a writ of certiorari to review the judgment in this case of the United States Court of Appeals for the Sixth Circuit.

OPINIONS BELOW

The district court did not write an opinion. The opinion of the court of appeals as amended upon denial of rehearing (App. A, *infra*) is reported at 404 F. 2d 303.

JURISDICTION

The judgment of the court of appeals was entered on December 9, 1968 (App. C, *infra*). A petition for rehearing was filed within the time as extended by the court, and was denied on January 24, 1969 (App. B, *infra*). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether in condemnation proceedings under Fed. R. Civ. P. 71A(h) it is for the court or for the jury or commission to decide whether certain lands were within the scope of a federal project (in which event the government would not be required to pay any enhancement to the value of the condemned tract brought about by the existence of that project).

2. Whether this scope-of-the-project rule requires a showing that it was decided in the early stages of the project that the particular tract in question would probably be taken, or that some tracts so situated would probably be taken, or a showing only that the land was within the general area influenced by the project and was taken for it.

RULE INVOLVED

Rule 71A(h) of the Federal Rules of Civil Procedure provides, in relevant part:

> [I]f there is no * * * specially constituted tribunal any party may have a trial by jury of the issue of just compensation by filing a demand therefor * * * unless the court in its discretion orders that * * * the issue of compensation shall be determined by a commission of three persons appointed by it. * * * Trial of all issues shall otherwise be by the court.

STATEMENT

This condemnation proceeding was instituted in United States District Court for the Western District of Kentucky to obtain more than 250 acres of respondents' land in conjunction with construction of the

Nolin Reservoir project. Most of the land condemned was taken because it would be inundated by the reservoir; about 78 acres were taken for use in the construction of recreation facilities on the shore of the reservoir, as part of the overall project. As a matter of policy, recreational areas have been acquired in conjunction with federal reservoir projects since 1944. In the present case, it appeared that Congress had appropriated planning funds for the project in 1956, and construction funds in October, 1958. In July of 1958, the Chief of Engineers (Department of the Army) had approved a general design memorandum contemplating the construction of appropriate recreational areas, but not specifying where they would be. The project was begun in January 1959; although not mentioned in a design memorandum submitted in June of that year, the 78 acres were designated for taking in the memorandum as approved in October, 1959. Respondents purchased the land in question in that month and in January, 1960. The notice of taking of this and other lands involved in the project was filed April 16, 1962. The district court's jurisdiction was invoked under 28 U.S.C. 1358, and a jury trial commenced, Fed. R. Civ. P. 71A(h), to determine the issue of just compensation.

At trial, the respondents contended that the addition of the 78 acres to the design memorandum was an afterthought, and, correspondingly, that the land ought to be valued for the recreational potential it would enjoy on account of the reservoir, rather than for the agricultural uses the land would have continued to enjoy had the reservoir not been built. On

the basis of a pre-trial hearing, the district court at first ruled that the valuation witnesses could not testify regarding any element of enhancement due to the project, since the property was within the scope of the project, *United States* v. *Miller*, 317 U.S. 369. After the jury was sworn, the court reversed itself and decided that the scope-of-the-project question should be submitted to the jury by special interrogatory, and that enhancement evidence therefore could be received. Opinions of value both including and excluding enhancement from the project were presented by the landowners. The jury found that the land was probably within the scope of the project from the time the government was committed to it and returned a verdict of $20,000.

On respondents' appeal, the court of appeals held that the scope-of-the-project issue was for the jury. It reversed upon finding that the lower court had improperly commented on evidence not heard by the jury relating to this question. In response to the government's petition for rehearing, which was denied, the court amended its opinion by inserting the following footnote (App. A, *infra*, at p. 17; App. B, *infra*):

> After argument of counsel and submission to the Court, *Amen Wardy* v. *United States*, — F. 2d — (5th Cir. 1968), was called to this Court's attention. We do not adhere to the ruling in *Wardy*, supra, for under the facts presented in the principal case the scope of the project is so interrelated with the valuation as to bring it within the issue of just compensation and therefore was a proper matter for jury determination.

REASONS FOR GRANTING THE WRIT

1. The opinion below is in acknowledged conflict with the Fifth Circuit's recent opinion in *Wardy* v. *United States*, 402 F. 2d 762, regarding the proper function of the jury or commission under Fed. R. Civ. P. 71A(h). In *Wardy*, the landowners sought to put before the jury testimony concerning the price they paid for two tracts condemned in connection with a federal project. They had purchased the tracts after the project's existence had become known. Under this Court's decision in *United States* v. *Miller*, 317 U.S. 369, 377, their right to receive compensation for any enhancement to the value of their land brought about by the project depended upon

> whether the respondents' lands were probably within the scope of the project from the time the Government was committed to it. If they were not, but were merely adjacent lands, the subsequent enlargement of the project to include them ought not to deprive the respondents of the value added in the meantime by the proximity of the improvement. If, on the other hand, they were, the Government ought not to pay any increase in value arising from the known fact that the lands probably would be condemned. The owners ought not to gain by speculating on probable increase in value due to the Government's activities.

The trial judge in *Wardy* ruled that the lands in question were within the scope of the project, thus defined, and refused to permit either that issue or the corresponding valuation evidence to be put before the jury. On appeal, the landowners contended that the scope-of-the-project question was a jury issue, and that the trial

judge had interfered with the jury's function by reserving it for himself. The Fifth Circuit affirmed, holding:

> Under rule 71A(h) the jury's function is limited to determining "just compensation." It is the duty of the court to decide the legal issues, as well as all other fact issues. [Citations omitted.] *Thus, instead of infringing on the jury's functions, the judge merely decided a legal question which limited the factors necessary to the determination of "just compensation."* [Emphasis supplied.]

In the present case, the landowners wanted the jury to hear testimony concerning the value their land would have for recreational uses—value created entirely by the federal reservoir project—and so claimed that the taking for that use had not been within the scope of the project in the *Miller* sense. The trial court concluded that this was a jury issue, and the court of appeals agreed. Thus, Sixth Circuit juries, unlike Fifth Circuit juries, will now receive evidence of enhancement values whenever landowners claim that the land taken was not within the scope of the project under *Miller*—even though the claim is unfounded and therefore these values should be disregarded.

We believe that the Fifth Circuit's interpretation of Rule 71A(h), treating the scope-of-the-project question as for the judge, is the correct one. As Rule 71A(h) itself recognizes by its provision for trial to commissioners, there is no constitutional right to jury trial in eminent domain proceedings. See, also, *Bauman* v. *Ross*, 167 U.S. 548, 593; *Sykes* v. *United*

States, 392 F. 2d 735 (C.A. 8); 5 Moore, *Federal Practice* ¶38.32[1]. It follows that the scope of any jury trial permitted by the Rules may be limited; and, as the Fifth Circuit noted, Rule 71A(h) plainly does limit the scope of jury consideration to "the issue of just compensation." All other issues, legal and factual, are to be decided by the district court. 7 Moore, *Federal Practice* ¶71A.90[3]; compare 1 Nichols, *Eminent Domain* (3d ed.) p. 524.

The Sixth Circuit concluded that the scope-of-the-project question is so interrelated with valuation as to bring it within the issue of just compensation and, therefore, the jury's competence. To justify this conclusion it relied on two cases: *Miller, supra;* and *John L. Roper Lumber Co.* v. *United States,* 150 F. 2d 329 (C.A. 4). The reasoning is insufficient to distinguish *Wardy;* if the interrelationship existed, it was present in that case as well as this one. And the cases relied upon do not carry the weight assigned to them. *Miller* arose long before the adoption of Rule 71A(h), and was governed by California procedure; nonetheless, the district court there excluded evidence of enhancement of value (317 U.S. at 372) and then, as a further precaution, instructed the jury to ignore any incremental value due to enhancement (*id.* at 373, 379). Thus, the *Miller* jury was not given the option of including or excluding enhancement depending on its view of the scope of the project, but was told by the judge that it could not consider such increments, as the jury here ought to have been instructed. *Roper* and a similar Fifth Circuit case, *Scott* v. *United States,* 146 F. 2d 131, were also decided before the

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adoption of Rule 71A(h). Since that time, both the Fourth and Fifth Circuits have recognized that the jury's or commission's function must now be limited to the value question. *United States* v. *91.69 Acres in Oconee County,* 334 F. 2d 229, 231 (C.A. 4); *Wardy, supra.*

There are important reasons to exclude the scope-of-the-project question from jury consideration. One purpose of Rule 71A(h) is to assure that only those factors which are properly a part of valuation reach the jury or commission. Yet, if the jury must decide whether or not a particular taking came within the scope of the project, unless there is a bifurcated trial it will also receive the evidence of enhancement which a trial judge deciding the issue might exclude as irrelevant to valuation. This not only makes the jury's role considerably more complex, but raises the real possibility that through compromise, confusion, or inadvertence juries will enlarge condemnation awards in view of the enhancement values they have heard, even though they decide that the taking was within the scope of the project. Cf. *Jackson* v. *Denno,* 378 U.S. 368; *Bruton* v. *United States,* 391 U.S. 123. The law does not give the jury a choice whether a particular condemnee shall receive some enhancement because of the government project.[1] Yet that is the prac-

[1] As this Court has frequently noted, it is as important in condemnation cases to see that the public does not pay too much as that the owner does not receive too little. *E.g., United States* v. *Commodities Trading Corp.,* 339 U.S. 121, 123; *United States* v. *New River Collieries Co.,* 262 U.S. 341, 344; *Bauman* v. *Ross, supra,* 167 U.S. at 574–575.

tical effect of submitting the scope-of-the-project question to a jury, since that submission permits the landowner to put his evidence of enhancement value before them.

The adverse impact of the Sixth Circuit's ruling is likely to be substantial. Almost 1,500 tracts are now awaiting trial in the Sixth Circuit—not counting tracts condemned by the Tennessee Valley Authority, which have only recently been made subject to the Rule 71A procedures, P.L. 90–536, 82 Stat. 885 (Sept. 28, 1968); the national total is 12,600 tracts.

2. Should certiorari be granted in this case, we believe it will also be appropriate to re-examine the substantive meaning of the scope-of-the-project test as it has evolved from *Miller*. There has been substantial confusion about the meaning of that test among the circuits, which are often called upon to apply the test in fact situations similar to that presented here—condemnation to create public recreation areas or similar facilities on the shore of a federally constructed dam and reservoir. Thus, the Third Circuit has adopted the view that the *Miller* test is satisfied only if the particular lands in question are identified as likely to be taken at the time the government becomes committed to the project. *United States* v. *172.80 Acres of Land, etc.*, 350 F. 2d 957. In the Eighth Circuit, on the other hand, it is sufficient if at the time of commitment it is clear that some of the land around the reservoir pool will be taken for that use, even though the particular land is not identified. *United States* v. *First Pyramid Life Ins. Co.*, 382 F. 2d 804; *United States* v. *Crance*, 341 F. 2d 161, cer-

tiorari denied, 382 U.S. 815. In the proceedings below, the trial court's special interrrogatory and charge to the jury appears to have adopted the Third Circuit view; the court of appeals cited the Eighth Circuit cases and stated the *Miller* test accordingly, without reference to the particular lands taken.[2]

Of the two, the Eighth Circuit view is plainly closer to this Court's cases. In *Miller,* this Court pointed out that both there and in the earlier case of *Shoemaker* v. *United States,* 147 U.S. 282, the lands taken had not been particularly identified in the plans, although the plans did indicate that some such lands would be taken for that purpose. 317 U.S. at 377–379. But we believe it is appropriate to question whether the *Miller* distinction between "subsequent enlargement of the project" and lands which it was known would probably be condemned in connection with an original project, *id.* at 377, is entirely satisfactory, even when thus viewed. Today, the planning and execution of major public projects may take years; a test which ties the question of enhancement to the scope or uses originally planned—even in general terms—may significantly and unjustifiably increase the costs the public pays. Thus, a dam may initially be authorized to a certain height only—yet with full public awareness that additional height may later be added. If the increase is treated as a "subsequent enlargement," speculation will be rewarded, and the public purse injured. Cf. *Smither* v. *United States,* 117 Ct. Cls. 574,

[2] "If recreational areas were [within the scope of the project], then the landowner would not be entitled to any enhanced value due to the project" (App. A, *infra,* p. 17).

91 F. Supp. 582, certiorari denied, 340 U.S. 931. True, there may be cases where enjoyment of the enhanced value created by a project has begun, or investments have been made in reliance on what are represented to be or finally appear as fixed plans. Yet it is readily to be anticipated that during the planning and construction of federal projects, plans may be changed to require the purchase of more or different lands than were originally contemplated; at least before the project is substantially realized, the public should not have to pay for this flexibility by condemnation awards inflated to reflect expectations that the project would be constructed in a different way.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted.

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APRIL 1969.

APPENDIX A

Corrected by Order of January 24, 1969

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 18292

Appeal from the United States District Court, Western District of Kentucky

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

811.92 ACRES OF LAND, MORE OR LESS, SITUATE IN EDMONSON AND HART COUNTIES, STATE OF KENTUCKY, WILLIAM R. PADGETT, ET AL., TRACTS NOS. 203, 603, 603–E, AND 603–E–2, W. G. REYNOLDS AND MARY N. REYNOLDS, DEFENDANTS-APPELLANTS

Decided December 9, 1968

Before O'SULLIVAN, CELEBREZZE and COMBS, Circuit Judges

CELEBREZZE, Circuit Judge. This appeal involves the valuation in a condemnation action instituted April 18, 1962 by the United States of America, hereinafter Appellee, against lands owned by W. G. Reynolds and Mary N. Reynolds, hereinafter the Appellants.

Appellants owned two tracts of land which were contained within the 811.92 acres condemned for the Nolin Reservoir Project in Edmonson and Hart Counties Kentucky. The property was designated Tract 203

and Tract 603, E and E–2. The latter Tract was taken in fee and easement.

The condemnation suit was tried before a jury which granted Appellants $20,000 as just and reasonable compensation for the taking of their land. It is Appellants' contention that misstatements contained within the Court's resume of the evidence greatly prejudiced the jury's decision that 78 acres within Tract 603 were within the scope of the project as defined in *Miller* v. *United States*, 317 U.S. 369, 63 S.Ct. 276 (1943), rehearing denied 318 U.S. 798.

In 1938 Congress authorized the construction of the Nolin Reservoir under the Flood Control Act. P.L. 761, 75th Congress. Funds were not appropriated for the planning of the project until July of 1956. Two years later on July 14, 1958, the Chief of Engineers approved a General Design Memorandum which contained all phases of construction and land acquisition. It was brought out through testimony that these memorandums generally contemplate the construction of appropriate recreational areas around reservoir sites. Neither this document nor any other design memorandum was entered into evidence.

Congress appropriated construction funds on October 12, 1958, but the project was not commenced until January of 1959.

Tract No. 603, the valuation of which is in dispute here, was purchased by Appellants in two separate transactions—one in October of 1959 and the other in January of 1960. The part of this Tract lying below the 566-foot level was to be inundated by the reservoir's water. No question is raised concerning its valuation, for it was admittedly within the scope of the project. The controversy revolves around the 78 acres contained within Tract 603 which was taken for public recreational purposes. This specific area was first designated in Design Memorandum No. 8, ap-

proved October 1, 1959. However, it was not contained within the memorandum as originally submitted on June 17, 1959. Appellants contend that its addition was merely an afterthought. The question the District Court placed before the jury was whether this property was probably within the scope of the project from the time the Government was committed to it and whether it was known that it probably would be condemned.

Prior to the swearing in of the jury the Court and the parties agreed that the rule set forth in *Miller* v. *United States,* 317 U.S. 369, 63 S. Ct. 276 (1943), rehearing denied 318 U.S. 798, would govern any questions relating to enhanced value. It was at this time that Appellee placed Max Bohrer on the stand in an attempt to have the Court rule that nc evidence of enhancement could be placed before the jury. Mr. Bohrer had been an employee of the Corps of Engineers for twenty-four years and presently was Assistant Chief of the Real Estate Division, in the District Office. Appellants introduced three witnesses to refute the testimony of Max Bohrer.

The Court decided that it was faced with "a mixed question of law and fact * * * [which] * * * addresses itself to the Court to be determined before we go into the trial of the case." The Court then determined that under *Miller* v. *United States,* 317 U.S. 369, 63 S. Ct. 276 (1943), rehearing denied 318 U.S. 798, the property was within the scope of the project from the beginning. Therefore the evidence of both parties would be limited to the value of the property without any enhancement. After a short recess, the jury was called and sworn to try the case. During the opening statements the Court called the attorneys to the bench and discussed its prior interpretation of the *Miller* case. At this point the Court reversed itself and decided that the mixed question of fact and law

concerning enhanced value should be submitted to the jury. The Court then permitted the attorneys to supplement their original statements to the jury.

Appellee takes issue with this interpretation of *Miller*. It does not believe the Court should have submitted to the jury the question of whether the 78 acres were within the scope of the project from the beginning of the Government's commitment to it. It would have this Court believe that under Rule 71A(h), Federal Rules of Civil Procedure, only a narrowly construed issue of just compensation may be submitted to the jury or commission. The Rule states that "* * * all other issues shall be tried by the court." Federal Rule of Civil Procedure 71A(h).

In *United States* v. *Certain Lands, etc.*, 144 F. Supp. 206 (1956) the court held that the issue of just compensation should not be interpreted as meaning that the jury's function is to be restricted solely to dollar amounts. The jury's province must be broad enough to weigh evidence which relates directly to the issue of just compensation. Courts have held that the question of whether or not a piece of property was within the scope of a project at a specific time is a proper one to be submitted to the jury. *United States* v. *Miller*, 317 U.S. 369, 63 S. Ct. 276 (1943), rehearing denied 318 U.S. 798, *cf. John L. Roper Lumber Co.* v. *United States*, 150 F. 2d 329 (4th Cir. 1945). In *United States* v. *Crance*, 341 F. 2d 161 (8th Cir. 1965), it was only by agreement that the District Court, rather than the jury, was to decide whether the land was within the scope of the project as set forth in *United States* v. *Miller*, 317 U.S. 369, 63 S. Ct. 276 (1943), rehearing denied 318 U.S. 798. There only the monetary issue of just compensation was submitted to the jury.

In the case before this Court there was no such agreement. Therefore, the issue of just compensation

which was submitted to the jury properly contained the question relating to the scope of the project. The Court dealt with this question in its first interrogatory to the jury.[1] The Court specifically wanted the jury to decide whether or not a recreational area was within the scope of the project prior to its dealing with the monetary aspects. If recreational areas were so contemplated, then the landowner would not be entitled to any enhanced value due to the project. *United States* v. *Miller,* 317 U.S. 369, 63 S. Ct. 276 (1943), rehearing denied 318 U.S. 798, *United States* v. *First Pyramid Life Insurance Company of America,* 382 F. 2d 804 (8th Cir. 1967), *United States* v. *Crance,* 341 F. 2d 161 (8th Cir. 1965). Since the jury decided that the 78 acre tract was within the scope of the project from the beginning, it did not include in its award any value due to enhancement. Unless there is other error present, this Court will not overturn the verdict of the jury based on substantial evidence. *Lavender* v. *Kurn,* 327 U.S. 646, 654 (1945), *Jayson* v. *United States,* 294 F. 2d 808 (5th Cir. 1961).*

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[1] "Do you believe that the 78 acres of land which was later developed by the Government as a recreation area and ramp were probably within the scope of the project from the time the Government was committed to build the dam and it was a known fact that this 78 number of acres probably would be condemned? Answer 'Yes' or 'No'.

Yes X

No_____."

*After argument of counsel and submission to the Court, *Amen Wardy* v. *United States,* — F. 2d — (5th Cir. 1968) was called to this Court's attention. We do not adhere to the ruling in *Wardy,* supra, for under the facts presented in the principal case the scope of the project is so interrelated with the valuation as to bring it within the issue of just compensation and therefore was a proper matter for jury determination.

On appeal this Court is primarily concerned with the propriety of the trial Court's instructions. The question arises as to whether the Court invaded the province of the jury by referring to certain facts contained within the testimony of the Government's chief witness Max Bohrer, taken outside the presence of the jury.

Appellants contend that the Court's resume of Max Bohrer's testimony greatly prejudiced them in the eyes of the jury.[2] They point particularly to the section where the witness was to have said that: "it was all within the reasonable probability of being taken when they first started the project." It is Appellants' contention that Mr. Bohrer only stated that the residents should have known that the 78 acre parcel was going to be taken by the Government because it was adjacent to the land to be taken for the reservoir.

This Court is of the opinion that Appellants were prejudiced by the Court's summation of Mr. Bohrer's testimony. The record disclosed that in his testimony before the jury Mr. Bohrer stated that the Corps of Engineers' regulations which have been in effect since 1944 provided for the acquisition of recreational areas.[3] He stated that when a project is authorized

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[2] In summarizing Max Bohrer's testimony the Court stated:

> "The United States offers the testimony of Mr. Bohrer, who says back in '58, '59, it was all taken, this was made into a ramp and into a recreation area. It was all taken at the same time and that *it was all within the reasonable probability of being taken when they first started on the development.*" (Emphasis added.)

[3] These regulations may be similar to those referred to in *Crance* v. *United States*, 341 F. 2d 161, 162 (8th Cir. 1965). The significant factor here was that the project contemplated recreational areas from its very inception. With reasonable certainty one could predict that land lying beyond the perimeter of the reservoir would have to be taken for recreational purposes. The Court reasoned that since the Crance property abut-

it is contemplated that it will include recreational areas. He went on to say that the general design memorandum normally planned for access points. However, Mr. Bohrer did not state that the Nolin Reservoir project, specifically, contemplated recreational areas, nor did he say that all of the property was within the reasonable probability of being taken when the Government started the project.

The record reveals that Max Bohrer and other witnesses were examined both in and outside the presence of the jury. It also discloses that part of the testimony referred to by the Court in its resume was taken outside the presence of the jury.[4] The part of the re-

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ted the reservoir line and recreational areas had been contemplated, it was within the sphere of probable acquisition as defined in the *Miller* decision. *United States* v. *Miller*, 317 U.S. 369, 63 S. Ct. 276 (1943), rehearing denied 318 U.S. 798.

[4] The record reveals that there was a preliminary motion to be taken up prior to going into the trial. Appellee assured the Court that if allowed to put on its proof, it would show that the question of enhancement should be decided by the Court. The Court decided to allow the testimony, but excluded the jury from the courtroom. It was at this time that Max Bohrer was first called to the stand. Relevant questions and answers contained in his testimony are as follows:

"Q. Now, do the regulations of the Corps of Engineers make any provision for public use and access areas on these particular type projects?

"A. Well, in the General Design Memorandum, which was approved by the Chief of Engineers in Washington, on the 14th day of July 1958, the General Design Memorandum contemplated the acquisition of land and the construction of appropriate access facilities around the reservoir."

* * *

"Q. * * * My question is, did you have any knowledge, representing the Corps of Engineers, that the plans to acquire this recreational area known as Site 7 was disclosed to the public in any way or to the landowner, prior to the date of March 31st, 1961?

"A. Well, of course, because this land is adjacent to the reservoir, it is in the category of what I would call likely

sume being questioned by Appellants introduced new evidence to the jury.

The Court's summary of Mr. Bohrer's testimony related to the material question of whether the 78 acres were within the scope of the project from the time the Government became committed to it.[5] This Court is not trying to limit the trial Court's right to summarize the facts—especially in a complex situation as was here presented. *Minner* v. *United States,* 57 F. 2d 506 (10th Cir. 1932), *Rudd* v. *United States,* 173 F. 912, 914 (8th Cir. 1909). However, a judge should be very careful and exacting in exercising this function. He is not to assume the role of a witness, nor is he to introduce new evidence. *Quercia* v. *United States,* 289 U.S. 466 (1933), *Benes* v. *United States,* 276 F. 2d

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to be taken for the project. As I said before, the planning goes on from the beginning to the end of this project and all land that is adjoining the reservoir or in the immediate vicinity thereof is susceptible to acquisition by the government until the project is completed."

COURT; * * *

"Q. Now, Mr. Bohrer, the question is whether the respondent landowners, that is the owners of this land in question, were probably within the scope of the project from the time the government was committed to it. * * *

"A. These lands were included within the scope of the project in our General Design Memorandum and—because part of the area we are talking about is required by flood control."

This testimony was made with specific reference to the 78 acre tract. It did not refer to vague or general Corps policies. The content is similar to the Court's resume which proceeded in a chronological order and dealt separately with each witness as he took the stand. The order in which the Court's resume deals with the witnesses is the same as they fall within the transcript of the proceeding. Where the Court has dealt with a witness twice, the witness has appeared both in and out of the jury's presence. It should be noted that the part of the resume which is questioned was the first of two references to Max Bohrer.

[5] See note 2.

99 (6th Cir. 1960). The jurors must be allowed to exercise their independent judgment upon the facts which are presented to them. The Court's inclusion of its review of evidential matters taken outside the presence of the jury in its comments to the jury represents reversible error.

The Court cautioned the jury that they were not to accept what he said as necessarily true nor were they to consider it as all of the evidence. He assured them that they were the ultimate triers of fact and that it was up to them to decide what the evidence was and what the inferences were to be drawn from it. Such an expression did not cure error in the charge pertaining to Mr. Bohrer's testimony. *Quercia* v. *United States,* 289 U.S. 466 (1932), *Nunley* v. *Pettway Oil Company,* 346 F. 2d 95 (6th Cir. 1965).

Appellants also claim error on several other grounds. They claim that the jury should have been instructed to bring in separate verdicts for each tract of land. No objection was raised concerning this particular point until after the jury had returned with a single verdict. The trial Court was not given the opportunity to correct itself, if error existed. It is the opinion of this Court that since Appellants enjoyed the benefit of the instruction as it stood, they are not now entitled to bring it up on appeal. *Welders Supply, Inc.* v. *American Employers' Insurance Company,* 358 F. 2d 593 (6th Cir. 1966).

Appellants also contend that the Court erred by not giving their requested instructions A, B, C, and D. This Court has held before in similar situations and so holds here that error will not result in such a refusal where the trial Court's instructions covered substantially the same thing. *Cobb* v. *Union Railway Co.,* 318 F. 2d 33 (6th Cir. 1963), cert. den. 375 U.S. 945, *U.S.*

Fidelity & Guaranty Co. v. *Canate,* 257 F. 2d 138 (6th Cir. 1958).

Lastly, the Appellants contend that they were prejudiced when the trial Court replaced one of the jurors with an alternate. The juror, R. S. Wingfield, had been seen talking with one of the witnesses. Although there was no actual showing of misconduct between the witness and the juror, the Court felt that the encounter raised a question of impropriety. We do not see how the Appellants were prejudiced by the Court's use of discretion. *Larson* v. *General Motors Corporation,* 148 F. 2d 319 (2d Cir. 1945), *cf. Jayson* v. *United States,* 294 F. 2d 808 (5th Cir. 1961). Alternate jurors were available and the Court felt there was sufficient reason to remove Wingfield to insure a just decision.

The judgment of the District Court is reversed and the case is remanded for further proceedings.

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 18292

ORDER

UNITED STATES OF AMERICA, APPELLANT

v.

811.92 ACRES OF LAND, MORE OR LESS, SITUATE IN EDMONSON AND HART COUNTIES, STATE OF KENTUCKY, WILLIAM R. PADGETT, ET AL., TRACTS NOS. 203, 603, 603-E AND 603-E-2, W. G. REYNOLDS AND MARY L. REYNOLDS, APPELLEES

Before O'SULLIVAN, CELEBREZZE AND COMBS, Circuit Judges

Upon due consideration, Appellant's petition for rehearing is denied.

It is further ordered that the following changes be made in the slip opinion filed December 9, 1968:

1. Strike out the word "repeatedly" in the seventh line of the first complete paragraph on page four; [1]

2. On page five at the end of the paragraph continued from page four insert an asterisk, i.e. * * * (5th Cir. 1961).*;

3. At the bottom of page five add the following footnote which will be designated by an asterisk:

*After argument of counsel and submission to the Court, *Amen Wardy* v. *United States*, —F.2d — (5th Cir. 1968) was

[1 The text at p. 16, l. 21, *supra*, originally read "Courts have repeatedly held * * *."]

called to this Court's attention. We do not adhere to the ruling in *Wardy*, supra, for under the facts presented in the principal case the scope of the project is so interrelated with the valuation as to bring it within the issue of just compensation and therefore was a proper matter for jury determination.

Entered by order of the Court.

CARL W. REUSS,
Clerk.

APPENDIX C

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 18292

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

811.92 ACRES OF LAND, MORE OR LESS, SITUATE IN EDMONSON AND HART COUNTIES, STATE OF KENTUCKY, W. G. REYNOLDS AND MARY N. REYNOLDS, DEFENDANTS-APPELLANTS

Before O'SULLIVAN, CELEBREZZE AND COMBS, Circuit Judges

JUDGMENT

Appeal from the United States District Court for the Western District of Kentucky.

THIS CAUSE came on to be heard on the record from the United States District Court for the Western District of Kentucky and was argued by counsel.

On Consideration Whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby reversed and the case remanded for further proceedings consistent with the opinion.

No costs awarded. Rule 39(b).

Entered by order of the Court.

CARL W. REUSS,
Clerk.

U.S. GOVERNMENT PRINTING OFFICE: 1969

Supreme Court of the United States

OCTOBER TERM

UNITED STATES, PETITIONER

v.

811.92 ACRES OF LAND, MORE OR LESS SITUATED IN EDMONSON AND HART COUNTIES, STATE OF KENTUCKY, WILLIAM R. PADGETT, ET AL.

Tract Nos. 203, 603, 603-E and 603-E-2
W. G. REYNOLDS AND MARY N. REYNOLDS, RESPONDENTS

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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In the
Supreme Court of the United States

OCTOBER TERM

No. ——

UNITED STATES, PETITIONER

v.

811.92 ACRES OF LAND, MORE OR LESS
SITUATED IN EDMONSON AND HART COUNTIES,
STATE OF KENTUCKY, WILLIAM R. PADGETT,
ET AL, ——————

Tract Nos. 203, 603, 603-E and 603-E-2
W. G. REYNOLDS AND MARY N. REYNOLDS,
RESPONDENTS

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Petitioners base their request for a Writ of Certiorari in this case on two arguments. First, that by holding that the trial court was correct in submitting the question of the time the taking was contemplated by the government to the jury, the Court of Appeals violated Rule 71A(h) of the Federal Rules of Civil Procedure and failed to correctly apply the rule set out in *United States* v. *Miller,* 317 U. S. 369. Second, that the holding in this case is at variance with the holdings in *United States* v. *Crance*, 341 F 2d 161 (3d

Cir.) and *Amen Wardy* v. *United States,* —— F 2d —— (5th Cir.). Respondents do not agree with either position.

Rule 71A(h) provides that only the question of just compensation of the landowner will be submitted to the jury in condemnation proceedings, and that all other questions will be decided by the Court. *Scott Lumber Co., Inc.* v. *United States* —— F 2d —— (9th Cir. 1968). Certainly the rule is nothing more than a statement of an existing situation, since in condemnation proceedings the only question of fact before the Court is the question of just compensation. The question which the Court submitted to the jury in the trial of this case was a question of just compensation. The petitioner argues that the manner in which that question was submitted to the jury makes its job more complex. This is perhaps true, but the question is no more complex than other questions which are submitted to juries daily. Petitioner also argues that submitting evidence on enhanced value to the jury in cases where the jury may decide that there is no enhancement will result in compromise awards and that landowners will be more than justly compensated. There is no proof of this. Indeed in this case, where evidence of enhancement was submitted in just such a manner, the jury gave the landowner considerably less than the witnesses testified the land was worth without enhancement.

The important point is this. The question of whether the landowner was entitled to enhancement was inextricably bound up in the question of just compensation. The trial judge saw it as a mixed question of law and fact and submitted it to the jury with instructions which came directly from *Miller*. The question was decided by the jury which was charged with the duty of arriving at an amount which would constitute just compensation. The enhancement question was only part of that verdict. But it was an inseparable part. It was a question of fact relating to the

issue of just compensation and was properly submitted to the jury.

The argument that this case is at variance with cases in other circuits may be answered in much the same way. The facts in this case were such that the question of the time of the decision to take was linked to the question of just compensation. There was no way to submit one without submitting the other. The Circuit Court found that this was not the situation in *Wardy*. Petitioner argues that the situation would be the same in either case, but cites no facts, makes no comparison of the cases. From a reading of the very brief opinion in Wardy there is every indication that the landowners knew the land was to be condemned at the time they bought it. If so this certainly would not be the type of case to be submitted to a jury under a *Miller* instruction. Petitioner also argues that this case is at variance with *Crance*. However, the question of whether or not enhancement evidence should have been submitted to the jury never arose in that case. As the Circuit Court points out in its opinion in this case, the question of whether the landowner was entitled to enhancement was decided by the Court by agreement between the parties. Certainly if the parties to litigation wish a particular issue to be decided by the Court they may agree to submit that issue. However, there was no such agreement in this case. In light of the differing factual situations in the cases it is difficult to see how a variance exists. The cases are similar only in that in all three the landowner raised the question of enhancement, but they do not represent a situation where different Courts have decided a similar case different ways.

CONCLUSION

For the reason stated above Respondents argue that the Circuit Court did not improperly apply or fail to follow Rule 71A(h) Federal Rules of Civil Procedure. Nor did the Court improperly apply or fail to follow the ruling of

United States v. Miller, (Supra). Respondents also ar
that there is no variance between the decision of the C
of Appeals for the Sixth Circuit and the decision of ot
Circuits as to the submission of enhancement evidence
jurys. There is no reason for the issuance of a Writ
Certiorari in this case and the Petition should be denied.

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7 Moore, *Federal Practice* (2d ed. 1968) par. 71A.90[3] ---------- 8

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In the Supreme Court of the United States

OCTOBER TERM, 1969

No. 88

UNITED STATES OF AMERICA, PETITIONER

v.

W. G. REYNOLDS AND MARY N. REYNOLDS

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE PETITIONER

OPINIONS BELOW

The district court did not write an opinion. The opinion of the court of appeals (App. 97), as amended upon denial of rehearing (App. 113), is reported at 404 F. 2d 303.

JURISDICTION

The judgment of the court of appeals was entered on December 9, 1968. A petition for rehearing (App. 105) was filed within the time as extended by the court, and was denied on January 24, 1969 (App. 113). The petition for certiorari was filed April 23, 1969, and was granted on October 13, 1969 (App. 114). The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether, in condemnation proceedings under F.R.Civ.P. 71A(h), it is for the court or for the jury or commission to decide whether certain lands were within the scope of a federal project (in which event the government would not be required to pay any enhancement to the value of the condemned tract brought about by the existence of that project).

2. Whether this scope-of-the-project rule requires a showing that it was decided in the early stages of the project that the particular tract in question would probably be taken, or that some tracts so situated would probably be taken, or a showing only that the land was within the general area influenced by the project and was taken for it.

RULE INVOLVED

Rule 71A(h) of the Federal Rules of Civil Procedure provides in relevant part:

> [I]f there is no * * * specially constituted tribunal any party may have a trial by jury of the issue of just compensation by filing a demand therefor * * * unless the court in its discretion orders that * * * the issue of compensation shall be determined by a commission of three persons appointed by it. * * * Trial of all issues shall otherwise be by the court.

STATEMENT

The United States instituted this condemnation proceeding in the United States District Court for the Western District of Kentucky to obtain more than 250 acres of respondents' land in conjunction with construction of the Nolin Reservoir Project. Most of

the land condemned was taken because it would be inundated by the reservoir. About 78 acres, however, were taken for use in the construction of recreational facilities on the shore of the reservoir, as part of the overall project (App. 98), and it is the valuation of this acreage that gives rise to the present controversy.

As a matter of policy, the government has acquired recreational areas in conjunction with federal reservoir projects since 1944.[1]

Although the project involved in this case was congressionally authorized in 1938[2] as part of a comprehensive flood control plan for the Ohio and Mississippi Rivers,[3] Congress first appropriated planning funds for the project in 1956.[4] In July 1958, the Chief of Engineers (Department of the Army) approved a general design memorandum contemplating the construction of appropriate recreational areas, but not specifying where they would be (App. 98). The first funds for construction were appropriated in September 1958.[5] The project was begun in January 1959; although not mentioned in a design memorandum submitted in June of that year, the 78 acres were designated for taking in a memorandum approved in October 1959 (App. 98). Respondents pur-

[1] Act of December 22, 1944, Pub.L. 534, 58 Stat. 887, 889, as amended; Corps of Engineers Manual 1130–2–302.

[2] Flood Control Act of 1938, 52 Stat. 1215, 1217.

[3] See Report of the Chief of Engineers to the House Committee on Flood Control, Com. Doc. No. 1, 75th Cong., 1st Sess.

[4] Public Works Appropriation Act of 1957, 70 Stat. 474, 479.

[5] Public Works Appropriation Act of 1959, 72 Stat. 1572, 1573.

chased the land in question in that month and in January 1960 (App. 98). After filing the complaint in condemnation, the United States filed a declaration of taking on April 18, 1962 (App. 10). The district court's jurisdiction was invoked under 28 U.S.C. 1358, and a jury trial commenced, pursuant to F.R.Civ.P. 71A(h), to determine the issue of just compensation.

At trial, the respondents contended that the designation of the 78 acres in the design memorandum was an afterthought, and, correspondingly, that such land ought to be valued for the lakeside residential and recreational potential it would enjoy on account of the reservoir, rather than for the agricultural uses the land would have continued to enjoy had the reservoir not been built (App. 32–33). After discussion with counsel, the district court first ruled that the valuation witnesses could not testify regarding any element of enhancement due to the project, since the property was within the scope of the project, *United States* v. *Miller*, 317 U.S. 369 * (App. 47–50).

After the jury was sworn, however, the court reversed itself and decided that the scope-of-the project question should be submitted to the jury by special interrogatory, and that enhancement evidence therefore could be received (App. 51–53). The landowners presented opinions of value both including and excluding enhancement from the project. In accordance with the accepted formula for evaluating compensation to condemnees, the government's witness testified

* The district court and counsel agreed that the *Miller* decision applied in this case (App. 30).

to the value of the entire tract, including the 78 acres, on the date of taking, excluding enhancement, and the value of the remainder, including enhancement. The valuations of the amount of compensation owed to respondents ranged from $188,230 for the respondents to $8,900 for the government. The jury found that the land was probably within the scope of the project from the time the government was committed to it and returned a verdict of $20,000 (App. 94).

On respondents' appeal, the court of appeals held that the scope-of-the project issue was for the jury. It reversed upon finding that the lower court had improperly commented on evidence not heard by the jury relating to this question. In response to the government's petition for rehearing, which was denied, the court amended its opinion by inserting the following footnote (App. 113):

> After argument of counsel and submission to the Court, *Amen Wardy* v. *United States*, —— F. 2d —— (5th Cir. 1968) was called to this Court's attention. We do not adhere to the ruling in *Wardy*, supra, for under the facts presented in the principal case the scope of the project is so interrelated with the valuation as to bring it within the issue of just compensation and therefore was a proper matter in jury determination.

The United States petitioned for a writ of certiorari on that issue and to clarify what is intended by "scope of the project." The petition was granted on October 13, 1969.

370-427—69——2

SUMMARY OF ARGUMENT

I

In limiting the jury's role to deciding the issue of just compensation, Rule 71A(h) requires the court to decide whether the property taken was within the scope of the project. Even before the adoption of Rule 71A(h), this Court, in the case of *United States* v. *Miller,* 317 U.S. 369, concluded that the scope-of-the-project question is primarily legal in nature and is therefore appropriate for decision by the trial court. The language of Rule 71A(h) makes it clear that the draftsmen of the Rule intended that the trial court should instruct the jury as to the proper criteria for evaluating condemned property, and the Fourth, Fifth and Ninth Circuits have held that under Rule 71A(h) the scope-of-the-project question must be decided by the trial court.

The Sixth Circuit's reasoning, that the scope-of-the-project question is so interrelated with valuation as to bring it within the issue of just compensation, and therefore, within the province of the jury, is erroneous, because the relationship between factual questions and the legal criteria for deciding those questions does not affect the responsibility of the trial court to instruct the jury as to what factors it ought to consider in reaching its verdict. Furthermore, allowing the jury to decide the scope-of-the-project question would require that the jury hear evidence of enhancement, and would increase the likelihood that through compromise, confusion, or inadvertence the jury will en-

large condemnation awards to include enhancement values even though they decide that the taking was within the scope of the project.

II

The scope-of-the-project test requires only a showing that the land taken was within the project's area of influence in order to exclude enhancement due to that project. In the *Miller* case, this Court stated the rationale of the scope-of-the-project rule, that landowners ought not gain by speculating on the enhanced values which they might realize, in the event of condemnation, as a result of the very project for which their property is condemned. There has been substantial confusion among the circuit courts in applying the scope-of-the-project test. Generally the circuits have erroneously required that the original project plans delineate specific lands or uses. This view is inconsistent with the rationale of the *Miller* case, and unjustifiably increases the cost that the public pays. This court should clarify its position on the scope-of-the-project rule, and direct the lower courts to focus their inquiry on whether the land was within the general area influenced by the project for which it was taken. Any more restrictive interpretation would encourage speculation on the possibility that land will be condemned and would interfere with the orderly development of government projects by encouraging agencies in the early stages of projects to overestimate their needs.

ARGUMENT

I. IN LIMITING THE JURY'S ROLE TO DECIDING THE ISSUE OF JUST COMPENSATION, RULE 71A(h) REQUIRES THE COURT TO DECIDE WHETHER THE PROPERTY TAKEN WAS WITHIN THE SCOPE OF THE PROPECT

Rule 71A(h) of the Federal Rules of Civil Procedure provides that, except in circumstances not relevant here, any party to a federal eminent domain proceeding "may have a trial by jury of the issue of just compensation * * *," unless the trial court determines, in its discretion, that the issue should be decided by a three-man commission. As the Rule specifies, "Trial of all issues shall otherwise be by the court." The concept of the Rule is straightforward: all issues other than compensation, whether legal or factual, are to be decided by the district court. *Wardy* v. *United States,* 402 F. 2d 762, 763 (C.A. 5); *Scott Lumber Company* v. *United States,* 390 F. 2d 388, 392 (C.A. 9); *United States* v. *91.69 Acres in Oconee County,* 334 F. 2d 229, 231 (C.A. 4); 7 Moore, *Federal Practice* (2d ed. 1968) par. 71A.90[3], p. 2799; cf. 1 Nichols, *Eminent Domain* (3d ed. 1964) p. 524. This limitation on the scope of a jury trial convened under Rule 71A(h) is permissible, for, as Rule 71A(h) itself recognizes by its provision for trial to commissioners, there is no constitutional right to jury trial in eminent domain proceedings. See *Bauman* v. *Ross,* 167 U.S. 548, 593; *Sykes* v. *United States,* 392 F. 2d 735 (C.A. 8); 5 Moore, *Federal Practice* (2d ed. 1968) par. 38.32[1], p. 239.

The critical inquiry, then, is: Does the "issue of just compensation" (as that term is used in the

Rule) comprehend the question w hether the con-
demned property was within the original "scope
of the project" for which the tak ing occurred (in
which event, under this Court's h olding in *United*
States v. *Miller*, 317 U.S. 369, the g overnment is not
required to pay any enhancement to the value of the
property brought about by the exist ence of the proj-
ect)? In *Miller*, which was decided be fore the adoption
of Rule 71A(h), the district court de cided on its own,
after considerable argument, that the tract in question
was within the scope of the project; accordingly, the
court excluded evidence of enhancement of value, and
instructed the jury to ignore any increment in value
due to enhancement. This Court held that "in so
charging the jury the trial court was correct." (*id.* at
379). Although the question was not explicitly dis-
cussed, the *Miller* Court seems to have concluded, even
before Rule 71A(h), that the scope-of-the-project
question is primarily legal in nature and is therefore
appropriate for decision by the trial court.

The adoption of Rule 71A imposed procedural uni-
formity on the federal courts in eminent domain pro-
ceedings, and ended the practice in most district courts
of following state law on procedural matters, includ-
ing allocation of function between judge and jury.
(See Advisory Committee Notes to Rule 71A). The
sweeping language of the last sentence of Rule 71A
(h), considered with the fact that the Rule allows
the trial court in its discretion to eliminate the jury
altogether and to appoint a commission to decide the
issue of just compensation, is substantial evidence that
the drafters of the Rule envisioned a broad role for

the trial court in eminent domain proceedings. This includes instructing the jury or commission as to the proper criteria for evaluating the condemned property, and would require the court to determine whether the jury or commission should consider enhancement in value due to the existence of the project for which the property is condemned.

Since the adoption of Rule 71A(h), the Fourth, Fifth and Ninth Circuits have recognized that the jury's or commission's function must be limited to the question of valuing the property taken under the criteria provided in the court's instructions. *Oconee County, supra; Wardy, supra; Scott Lumber Company, supra.* Most recently the Fifth Circuit in *Wardy* has held that the Rule treats the scope-of-the-project question as one for the judge (402 F.2d at 763):

> The question was whether appellants' "lands were probably within the scope of the project from the time the Government was committed to it." *Miller, supra* at 377. * * * Appellants contend that the jury should have been allowed to answer this question. Under rule 71A(h) the jury's function is limited to determining "just compensation." It is the duty of the court to decide the legal issues, as well as all other fact issues. [Citations omitted.] *Thus, instead of infringing on the jury's functions, the judge merely decided a legal question which limited the factors necessary to the determination of "just compensation."* [Emphasis supplied.]

In the present case, the district court and the Sixth Circuit rejected the Fifth Circuit's analysis and concluded that the question whether the taking of 78

acres for recreational uses was within the scope of the project in the *Miller* sense was a jury issue; consequently, testimony of the enhanced value of the land for lakeside residential and recreational purposes was admitted. The Sixth Circuit reasoned that the scope-of-the-project question is so interrelated with valuation as to bring it within the issue of just compensation and, therefore, within the province of the jury, citing *Miller, supra,* and *John L. Roper Lumber Co.* v. *United States,* 150 F. 2d 329 (C.A. 4). That rationale, we submit, is unsound.

Obviously, the scope of the project will be, in all cases, related to the valuation of the property condemned for that project, in the same sense that the legal criteria for deciding any factual questions are related to that question. However, as *Wardy* and numerous other cases in other areas of the law illustrate, cf. *United States* v. *Merz,* 376 U.S. 192, 198, the relationship between legal criteria and the factual determinations to which they are applied in no way diminishes the court's responsibility to instruct the jury as to what factors it should consider in reaching its verdict, particularly under a standard such as that set forth in Rule 71A(h), which is so expansive of the trial court's duties.

Neither *Miller* nor *Roper,* decided by the Fourth Circuit, controverts our view of Rule 71A(h). Indeed, it is difficult to see on what basis the Sixth Circuit concluded that *Miller* supports its position, since, as we have discussed, *Miller* not only antedated Rule 71A(h), but also approved the trial court's determination to exclude evidence of enhancement. As for

Roper, that case, like a similar Fifth Circuit case, *Scott* v. *United States,* 146 F.2d 131, was decided before the adoption of Rule 71A(h). Since that time, both the Fourth and Fifth Circuits have recognized that Rule 71A(h) requires the court to determine the scope of the project. *Oconee County, supra; Wardy, supra.*

In addition to the inherent suitability of this issue to judicial determination, there are important reasons to exclude the scope-of-the-project question from jury consideration. One purpose of Rule 71A(h) is to assure that only those factors which are properly elements of valuation reach the jury or commission. Yet, if the jury must decide whether or not a particular taking came within the scope of the project, unless there is a bifurcated trial it will also receive the evidence of enhancement which a trial judge deciding the issue might exclude as irrelevant to valuation. This not only makes the jury's role considerably more complex, but raises the real possibility that through compromise, confusion, or inadvertence, juries will enlarge condemnation awards in view of the enhancement values they have heard, even though they decide that the taking was within the scope of the project. Cf. *United States* v. *Merz, supra,* 376 U.S. at 198; *Jackson* v. *Denno,* 378 U.S. 368; *Bruton* v. *United States,* 391 U.S. 123. The law does not give the jury a choice whether a particular condemnee shall receive some enhancement because of the government project.[7] Yet that is the practical effect of

[7] As this Court has frequently noted, it is as important in condemnation cases to see that the public does not pay too

submitting the scope-of-the-project question to a jury, since that submission permits the landowner to put his evidence of enhancement value before them.[8]

II. THE SCOPE-OF-THE-PROJECT TEST REQUIRES ONLY A SHOWING THAT THE LAND TAKEN WAS WITHIN THE PROJECT'S AREA OF INFLUENCE IN ORDER TO EXCLUDE ENHANCEMENT DUE TO THAT PROJECT

In the *Miller* case, *supra*, this Court upheld the district court's exclusion of valuation testimony enlarged by the development of the federal project for which the land was taken. In so doing, the Court contemplated two situations where the exclusion of enhancement would arise: (1) where the land was clearly within the confines of the project at its inception and the condemnation was simply delayed; and (2) where the land was within the area where it was likely to be taken, but might not be taken. 317 U.S. at 379. The land in *Miller* came within the latter category. The Court phrased the test for excluding enhancement as follows (317 U.S. at 377):

> The question then is whether the respondents' lands were probably within the scope of the project from the time the Government was committed to it. If they were not, but were

much as that the owner does not receive too little. *E.g.*, *United States* v. *Commodities Trading Corp.*, 339 U.S. 121, 123; *United States v. New River Collieries Co.*, 262 U.S. 341; *Bauman* v. *Ross*, *supra*, 167 U.S. at 574–575.

[8] We note that the adverse impact of the Sixth Circuit's ruling was increased by the recent congressional application of Rule 71A(h) to condemnations by the Tennessee Valley Authority. Pub. L. 90–536, 82 Stat. 885 (Sept. 28, 1968).

> merely adjacent lands, the subsequent enlargement of the project to include them ought not to deprive the respondents of the value added in the meantime by the proximity of the improvement. If, on the other hand, they were, the Government ought not to pay any increase in value arising from the known fact that the lands probably would be condemned. *The owners ought not to gain by speculating on probable increase in value due to the Government's activities.* (Emphasis added.)*

The *Miller* principle is thus founded on elementary fairness and has been applied in many contexts. See *United States* v. *Cors*, 337 U.S. 325, 332–334; *Cameron Development Co.* v. *United States*, 145 F.2d 209, 210 (C.A. 5); *United States* v. *Rayno*, 136 F.2d 376, 378–379 (C.A. 1), certiorari denied, 320 U.S. 776; *United States* v. *2,477.79 Acres in Bell County, Tex.* (*Bowles*), 259 F.2d 23, 27 (C.A. 5); *United States* v. *158.76 Acres in Windham County, Vt.*, 298 F.2d 559 (C.A. 2); *United States* v. *Whitehurst*, 337 F.2d 765 (C.A. 4).

However, application of this "scope of the project" test has resulted in substantial confusion among the circuits, which are often called upon to apply the test in fact situations similar to that presented here—condemnation to create public recreation areas or similar

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* Conversely, if a project depresses land values, the government cannot discharge its obligations to provide just compensation by paying project-depreciated prices. *United States* v. *Virginia Electric & Power Co.*, 365 U.S. 624, 630, 635–636; *United States* v. *74.60 Acres in Miami County, Ind.* (*Conn*), 358 F.2d 143, 145 (C.A. 7); *Murray* v. *United States*, 130 F.2d 442, 444 (C.A. D.C.).

facilities on the shore of a federally constructed dam and reservoir. Thus, the Third Circuit has adopted a restricted view of the *Miller* test, which binds the government literally by the "original design," rather than the general purposes of the project, and permits no flexibility as the planning proceeds during the execution of the project. Moreover, the Third Circuit test requires "indicat[ion] at the outset" that "a particular tract or area" will probably be acquired. *United States* v. *959.68 Acres in Mercer County, Pa.* (*Burdette*), 415 F. 2d 401; *United States* v. *172.80 Acres in Mercer County, Pa.* (*Totten*), 350 F. 2d 957. In the Eighth Circuit, on the other hand, it is sufficient to exclude enhanced values if, at the time the government becomes committed [10] to the project, it is clear that some of the land around the reservoir pool will be taken for a use specified in those plans, even though the particular land is not identified. *United States* v. *First Pyramid Life Ins. Co. of America*, 382 F. 2d 804; *United States* v. *Crance*, 341 F. 2d 161, certiorari denied, 382 U.S. 815. In the proceedings below, the district court, in its special interrogatory and charge to the jury, appears to have adopted the Third Circuit view (App. 86); the court of appeals stated the *Miller* test and then cited the

[10] As the Eighth Circuit makes clear in its opinion, "committed" in this sense does not refer to any legal obligation on the government's part, since only the filing of a declaration of taking would legally obligate the United States as to particular property or estates. *Miller* reasonably regarded the appropriation of funds for construction as the first indication that a project would be built and that from that point on any enhancement due to the project would not be recoverable by the condemnees.

Eighth Circuit cases without attempting to apply the test to the particular tract in question [11] (App. 100).

We believe that the Eighth Circuit's view of the scope-of-the-project rule is closer to the meaning of this Court's decision than is the view of the Third Circuit. Neither circuit court, however, has, in our opinion, sufficiently followed this Court's admonition in *Miller* that "The owners ought not to gain by speculating on probable increase in value due to the Government's activities." 317 U.S. at 377.

In light of this key statement, we question the Eighth Circuit's view that the exclusion of enhancement should be restricted to those takings for which the specific uses are delineated in whatever plans are extant at the time Congress first appropriates construction funds. The language and holding in *Miller* indicate strongly that this Court intended that the cost of a government project should not be increased by the value of the benefits conferred by the project itself. It is true that both in *Miller* and in the earlier case of *Shoemaker* v. *United States,* 147 U.S. 282, the plans indicated that some lands, not then identified, would be taken for certain project purposes during later phases of the project. Nothing in the Court's opinion in either case, however, suggests that the presence of these vague plans was crucial to this Court's analysis.

The planning and execution of major public projects may take years. A test which ties the question of enhancement to the four corners of the original

[11] "If recreational areas were [within the scope of the project], then the landowner would not be entitled to any enhanced value due to the project" (App. 100).

plans—even in general terms—may significantly and unjustifiably increase the costs the public pays. Thus, preliminary plans for a dam may indicate a certain height, yet final plans may increase that height as a result of further engineering studies. If the increase is not originally designated and is therefore treated as a "subsequent, independent enlargement" of the project, speculation will be rewarded, and the public purse injured.

In the instant case, recreational areas were required to be included at some point in the planning of the project,[12] in line with Congressional policy.[13] Under *Miller,* omission of this phase of the project from initial plans should not give rise to a right of condemnees to "gain by speculating" on the enhanced values brought about by the project. As the Court of Claims said of the situation before it in *Smither* v. *United States,* 117 C. Cls. 574, 580, 91 F. Supp. 582, 583, certiorari denied, 340 U.S. 931, "Here there were not separate takings; there was only one project and one taking."[14]

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[12] Corps of Engineers Manual 1130–2–302.

[13] See note 1, *supra.*

[14] In *United States* v. *2,353.28 Acres in Brevard and Volusia Counties, Fla.* (*Colton*), 414 F.2d 965 (C.A. 5), a taking of land for a subsequent enlargement of the lunar launch site at Cape Kennedy was held not to be within the confines of the original project. This was because NASA officials had repeatedly stated in public testimony to the congressional committee, and otherwise publicly, that no enlargement would be needed. In addition, when funds were sought for the extension, they acknowledged that the expansion resulted from bringing to this NASA facility a program of the Department of Defense. See also *Scott* v. *United States,* 146 F.2d 131 (C.A. 5), where enlargement of an Army

If *Miller* leaves any doubt as to whether landowners can gain by forcing the government to pay for the enhanced value resulting from the very project for which their property is taken, merely because these particular properties or their ultimate uses are not delineated in the original plans, this Court should clarify its position on the scope of the project rule and reaffirm its intention to prevent speculation at the government's expense on the benefits of a government project. We submit that the relevant inquiry under the scope of the project rule should be whether the land was within the general area influenced by the project for which it was taken. In this sense, the word "project" refers to the general purposes which the government is trying to achieve, rather than to the detailed means of accomplishing these purposes, because the details are always likely to be altered by the facts developed during construction. Cf. *Woodville* v. *United States*, 152 F. 2d 735, 738 (C.A. 10); *United States* v. *Rayno*, 136 F. 2d 376, 379 (C. A. 1), certiorari denied, 320 U. S. 776; *United States* v. *Certain Parcels of Land in Fairfax County* (*Belle Haven*), 228 F. 2d 280, 283 (C. A. 4), certiorari denied, 351 U. S. 907.

Any more restrictive interpretation of the scope-of-the-project rule would encourage landowners to speculate on the likelihood that the government will condemn their lands and then, if condemnation occurs,

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base, as a result of the Selective Service Act, was held to be an independent project. But compare *John L. Roper Lumber Company* v. *United States*, 150 F.2d 329, 332 (C.A. 4), reaching a contrary result, respecting enlargement of a Marine Corps base.

to claim, ironically, that they are entitled to the enhanced values brought about by the project on the ground that it was not certain at the time the original project plans were drafted that the taking would occur. Correspondingly, such a restriction would also interfere with the orderly development of any project because it would encourage acquiring agencies to overestimate, in early planning stages, the lands needed to complete the project, on pain of being held liable subsequently for project-created values. This is inherently unfair and would be disruptive and inconvenient to individual landowners and local communities, as well as to government.

We recognize that there will be cases where enjoyment of the enhanced value created by the project has begun, or investments have been made in reliance on what may appear as fixed plans.[15] Yet it is only practical to realize that the planning of federal projects cannot totally precede their construction and that some changes in plans must be anticipated. Where the orderly development of the project requires the acquisition of land not previously drafted into engineering plans, the public should not have to pay for this needed flexibility by condemnation awards inflated to reflect expectations that the project would be constructed in a different way.

It is clear that the land here involved was taken for an essential feature of the Nolin Reservoir Pro-

[15] These and other noncompensable equities are also recognized by Congress. See S. 1, "Uniform Relocation Assistance and Land Acquisition Policies Act of 1969," Secs. 201, 301, and S. Rep. No. 91–488, 91st Cong., 1st Sess., Oct. 21, 1969.

ject and not for some other or additional project. Consequently, under *Miller*, no enhancement attributable to that project should be payable by the public. The landowner is fully compensated for what he had—agricultural property—but not for what the government created at great cost—lakeshore property.[16]

CONCLUSION

For the foregoing reasons, the decision of the court of appeals should be modified, with instructions to direct the district court on remand to determine itself whether the condemned lands were within the scope of the project, under the clarified standards set forth by this Court.

Respectfully submitted,

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NOVEMBER 1969.

[16] The *Miller* rule does not change the date of taking or exclude increases in values before the actual taking due to causes other than the project.

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In the Supreme Court of the United States

OCTOBER TERM, 1969

No. 88

UNITED STATES OF AMERICA PETITIONER

v.

W. G. REYNOLDS AND MARY N. REYNOLDS

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE RESPONDENT

ARGUMENT

This case involves the question of the amount of damages to be awarded where the United States Government changes its design on a reservoir so as to take in an additional parcel of land from the same landowner and such additional tract has been enhanced in value by reason of the original project.

The United States of America instituted condemnation action against the Respondents, landowners, on April 18, 1962.

In 1938 Congress authorized the construction of Nolin Reservoir. Funds were not allocated for the project until July, 1956. July 14, 1958 the General Design Memorandum was approved and it contained all phrases of construction and land acquisition. This Memorandum con-

templated the construction of recreational areas around the reservoir.

Funds for the project were appropriated October 12, 1958 and the project was started January 1, 1959.

The tract in issue here was purchased in two separate sales, the first being October, 1959 and the second January, 1960. A portion of the said tract lies below the 566 feet level which is the part of the reservoir. There is no question about this portion of the acreage as far as value is concerned as it was within the scope of the project.

However, 78 acres of the said tract lies above the reservoir and above the 566 feet level and was not contained in the project original design nor was it contained in the original Memorandum submitted on June 17, 1959. The 78 acres was first designated in Design Memorandum No. 8 and approved October 1, 1959. The question submitted to the Jury in the Trial Court was whether this property was probably in the scope of the project from the time the Government was committed to it and whether it was known it probably would be condemned.

Petitioner takes issue with the Sixth Circuit Court's interpretation of *Miller v. United States*, 317 U. S. 369, 63 S. Ct. 276, 87 L. ed. 336, in that it does not believe the Court should have submitted to the Jury the question of whether the 78 acres were within the scope of the project from the beginning of the Government's commitment to it. The Petitioner would have the Court believe that under Rule 71 A(h) Federal Rules of Civil Procedure only the narrow issue of just compensation may be submitted to the Jury.

As the Court of Appeals stated in the instant case, "In *United States v. Certain Lands, etc.*, 144 F. Supp. 206 (1956) the Court held that the issue of just compensation should not be interpreted as meaning that the Jury's function is to be restricted solely to dollar amounts. The Jury's province must be broad enough to weigh evidence which

relates directly to the issue of just compensation. Courts have repeatedly held that the question of whether or not a piece of property was within the scope of a project at a specific time is a proper one to be submitted to the Jury. *United States v. Miller,* 317 U. S. 369, 63 S. Ct. 276 (1943), rehearing denied 318 U. S. 798, cf. *John L. Roper Lumber Co. v. United States,* 150 F. 2d 329 (4th Cir. 1945). In *United States v. Crance,* 341 F. 2d 161 (8th Cir. 1965), it was only by agreement that the District Court, rather than the Jury, was to decide whether the land was within the scope of the project as set forth in *United States v. Miller,* 317 U.S. 369, 63 S. Ct. 276 (1943), rehearing denied 318 U. S. 798. There only the monetary issue of just compensation was submitted to the Jury".

The Miller case appears to create uncertainty when it states that, "The question... is whether the respondents' lands were probably within the scope of the project from the time the Government was committed to it. If they were not, but were merely adjacent lands, the subsequent enlargement of the project to include them ought not to deprive the respondents of the value added in the meantime by the proximity of the improvement. If, on the other hand, they were, the Government ought not to pay an increase in value arising from the known fact that the lands probably would be condemned..." 87 L. ed., at 344.

However, when one understands the factual situation in *United States v. Miller,* supra, there can be no misunderstanding of the rationale of the case.

The Court stated "the project, from the date of its final and definite authorization in August 1937, included the relocation of the railroad right-of-way, and one probable route was *marked out* over the respondents' lands. (Emphasis supplied.) This being so, it was proper to tell the Jury that the respondents were entitled to no increase in value arising after August 1937 because of the likelihood of the taking of their property..." 87 L. ed., at 345.

Thus, it is clear that in the Miller case, the right-of-way over the landowners' property was in the original design "marked out". In the instant case it is equally clear that there wasn't one iota of evidence to show that the respondent's property was "marked out" or included in the original design plan. On the contrary the petitioner agrees that the original design did not include the respondent's property that is the subject of this appeal. There was nothing in the original design plan to alert the landowner that his land would be taken. In Miller, the original project plan contemplated flooding an area occupied by the tracks of a railroad. Miller's land was situated where the tracks would be relocated. This was the original design plan. The petitioner admits this was not the factual situation in the instant case, as the respondents' land was not originally contemplated for a recreation area.

The respondent states that where the factual evidence is clear then, as a matter of law, the Court should rule on the matter of enhancement; however, where the factual evidence is a mixture of law and fact as the Court stated in this case, then the jury should decide the question of enhancement.

The rule established in the Miller case is one of probability. Thus, a jury should determine cases where probability is not a certainty.

The Petitioner requests this Court to change *United States v. Miller,* supra, in regard to the "scope of the project" test. It is obvious, the petitioner could not prevail if the Court applies the Miller case test to the instant case. The Petitioner desires the Court to make a new rule that would state that any land adjacent to or near a project should not take on an enhanced value even if that land was not part of the original project. This concept violates all rules of equity or eminent domain.

To quote from the Third Circuit case of *United States of America v.* 172.80 *Acres of Land, supra*: "In sum, a

purchaser contemplating the acquisition and private development of the Totten property after the 1959 initiation of the reservoir project could reasonably anticipate that he would be able to devote the land to its highest economic use, enjoying advantages inherent in the proximity of the hereby government development without serious apprehension that his land would soon be condemned. Thus, enhancement of value during this period was properly included in the subsequent condemnation award. Cf. *Scott v. United States,* 5th Cir. 1944, 146 F. 2d 131; *Blas v. United States,* 9th Cir. 1958, 261 F. 2d 636".

Surely, the above case of *United States of America v.* 172.80 *Acres of Land* is squarely on point in the present case. The United States has offered no concrete proof or evidence that the 78-acre parcel was within the scope of the project from the time the government was committed to the plan. As stated previously, there is no question but that all land considered in this case, other than the 78-acre tract, was considered in the plan of the government at the time it became committed to the project. However, to say that the 78-acre tract was probably within the scope of the project from the time the government became committed to it merely on the basis that the land was adjacent to other lands to be taken is a clear violation of the spirit and rule of the above cases.

The defendants have shown by their witnesses that there was no general knowledge in the area of the Nolin Reservoir project that the 78 acres was to be taken. There was no mention by the United States through any of its agents of the planned recreation area until several years after the plans for the Reservoir project had been made known. Defendants have shown clearly the 78 acres were not within the scope of the project from its outset, but were merely adjacent lands taken by the government in the subsequent enlargement of the project, and therefore, the taking of

this parcel should not deprive the defendants of any enhanced value added by the proximity of the Reservoir.

Where the question of scope of the project is so interrelated with the question of just compensation, that it becomes impossible to set a value without consideration of that question, it should be decided by a jury.

Petitioner takes the position that Rule 71A(h) of the Federal Rules of Civil Procedure forecloses the possibility of jury consideration of any other question than the dollar value of the property in condemnation cases and cities among others the case of *U. S. v.* 91.69 *Acres in Oconee County*, 334 F. 2d 229, 321 (3 cir). However, the Oconee County case does not hold that the jury is limited by the language of Rule 71A(h). The said case involved the question of whether or not the Government, in condemning a portion of the landowners' property for a reservoir, was entitled to take a fee simple interest or merely a flowage easement. The District Court submitted the question to the jury in the form of an interrogatory and instructed them to find an amount for both a flowage easement and for the fee simple interest. On appeal the Court pointed out that the District Court was limited to the consideration of whether eminent domain was being used to acquire property for public use. Once that determination was made, the Court could go no further. The type and manner of estate the Government acquires is entirely a legislative and executive matter and not a question for the Court or the jury to decide. The Court remanded the case to the District Court with instructions to limit the jury's inquiry *U. S. v.* 91.69 *Acres in Oconee County*, 334 F. 2d 229, 231-232. The said case therefore can in no way be said to represent the proposition that the language of Rule 71A(h) limits the jury's inquiry to nothing more than the dollar and cent value of the property.

The Court has never had occasion to construe the language of Rule 71A(h) and there is as a result some

confusion as to the scope of the jury's inquiry in condemnation cases. The Petitioner contends that the better view is stated in *United States v. Crance* 341 F. 2d 161 (3d cir) and *Amen Wardy v. United States,* 402 F. 2d 762 (5th cir). The holdings in these cases are not compatible with the situation presented in the instant case. The Crance case involved land adjoining the line of a reservoir project which was being taken for a recreation area. As in the instant case the question was whether the property was within the scope of the project and therefore whether or not the landowner was entitled to recover for the enhanced value of his land as a result of his proximity to the reservoir. However, in the Crance case the question of whether the property was within the scope of the project was submitted to the Court by agreement of the parties. Neither side made any contention that the jury should decide the question or that it was in any way related to the question of just compensation. The question in this case was not considered in the Crance case. Here the respondents have consistently argued that the factual question of the scope of the project was so inextricably related to the question of value that the two together make up the question of just compensation.

The only case that can be said to have dealt directly with the question of who should decide whether a landowner is entitled to enhancement is *Amen Wardy v. United States,* 402 F. 2d 762 (5th cir.). In that case in a short opinion the Court dealt with the question of whether the landowner's property was within the scope of the project at the time the Government was committed to it. While the opinion does not contain very much information as to the factual matter it is possible to infer from a reading of the opinion that the Court decided the landowners knew or should have known that the land was going to be condemned before they purchased it. *Wardy v. United States* 402 F 2d 762, 763. The District Court in the instant case did not feel that the Government's evidence as to avail-

ability of information was such so as to overcome the landowner's evidence that the contemplated condemnation was not generally known. The tenor of the Wardy case was that the Court was convinced the landowners had purchased the property with the express purpose of placing themselves in the path of condemnation. Thus in the Wardy case the Court decided the factual evidence was so conclusive that it was not a jury question. Such is not the case here.

It is the contention of the petitioners that the more reasoned approach is that the jury should decide those questions of fact that are to be considered in the entire question of just compensation. As was pointed out in *John L. Roper Lumber Co. v. United States,* 150 F. 2nd 329 (4th cir.) and in *United States v. Certain Parcels of Lands in Middlesex County,* 144 F. Supp. 206, (3d cir.) the jury should not be limited strictly to the single question of the value of the land in terms of dollars and cents. The question which the jury is to decide is the question of just compensation and just compensation only. It is not to decide questions of the propriety of the taking, the validity or the invalidity of the use of any other question except the one. The question in *United States v. Certain Lands* supra, was a fact situation dealing with the necessity or lack of necessity of replacing a road taken by the United States. The question was submitted to the jury under Rule 71A (h) and the action was approved by the Circuit Court. The Court obviously felt that the whole question of whether or not the landowner was being justly compensated including the factual question of the necessity of replacing the road which the United States had taken. So in this case the question of whether or not the landowner is being justly compensated includes the factual question of whether or not the land being taken was within the scope of the project from the time the Government was committed to it.

This is the primary question. The Petitioner is contending that the question of just compensation as used in Rule 71A (h) means the dollar and cent value of the property being condemned. This assumption is fallacious. It is respondent's contention that the issue of just compensation includes those factual questions which determine whether or not the Government's offer will justly compensate the landowner. Consider the nature of condemnation proceedings. The landowner has the burden of proving that the value of his land is more than the Government has offered him, in other words that the sum of money which the Government has deposited with the Court will not justly compensate him for his property. The jury is therefore being called on to decide on ultimate factual question which may include several facts. One of those facts is the question of enhancement; first whether or not the landowner is entitled to enhancement; second what the value of that enhancement is. The question decided by the jury in this case was a question of whether or not the landowner was being damaged to a greater extent than the simple loss of his property i.e. whether or not he was losing the enhancement as well. This is a factual question and a question of just compensation. It is inextricably bound to the question of the correct valuation of the property. It is a question properly put to the jury in this case.

The Government would have the Court believe that any land that lies adjacent to a reservoir project even though not in the original design plan or originally contemplated to be part of the plan should be denied enhanced value.

The sole reason apparently is it will save the Government money if this Rule were applied to the "scope of the project" test. The unfairness of this Rule to the landowners apparently does not enter into the Petitioner's consideration. The basic philosophy of eminent domain is violated by the Petitioner's argument and reasoning.

CONCLUSION

The respondents respectfully urge for the foregoing reasons, the decision of the Court of Appeals should be sustained with instruction to direct the District Court on remand to determine whether the facts in this case were so clear that it is a matter of law and the Court direct the Jury to consider only the enhanced value of the subject land or whether the evidence presents a mixed question of law and fact which the Jury should determine whether the enhanced value should or should not be allowed.

Respectfully submitted,

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December 1969.

McCLURE PTG. CO., INC., VERONA, VA.

OPINION

NOTICE: This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D.C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

SUPREME COURT OF THE UNITED STATES

No. 88.—October Term, 1969

United States, Petitioner, v. W. G. Reynolds et ux. } On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit.

[February 24, 1970]

Mr. Justice Stewart delivered the opinion of the Court.

The United States brought this suit in the Western District of Kentucky to condemn more than 250 acres of the respondents' land for a federal development known as the Nolin Reservoir Project located in that State. An important issue in the case was raised by the respondents' claim that 78 acres of the land, taken for construction of recreational facilities adjacent to the reservoir, had not been within the original scope of the project.[1] A jury

[1] Congress authorized the Nolin Reservoir Project in 1938 as part of a comprehensive flood control plan for the Ohio and Mississippi Rivers. See Act of June 28, 1938, § 4, 52 Stat. 1217. Congress first appropriated funds for the planning stage of the project in 1956. See Public Works Appropriation Act of 1957, 70 Stat. 479–480. In July 1958 the Chief of Army Engineers approved a general design memorandum contemplating the construction of recreational areas in connection with the project, but evidently not specifying where they would be. The first funds for construction were appropriated in 1958. See Public Works Appropriation Act of 1959, 72 Stat. 1573. Construction began in January 1959.

Most of the respondents' acreage condemned by the Government was taken because it would be inundated by the reservoir, and there is no question that this land was within the original scope of the project. But 78 acres of the tract were taken for the construction of recreational facilities adjacent to the reservoir itself. These 78

awarded the respondents $20,000 as just compensation for all the land taken. Upon an appeal by the respondents, the Court of Appeals for the Sixth Circuit reversed the judgment and ordered a new trial, finding that the District Judge in his instructions to the jury had erroneously referred to matters disclosed outside the jury's presence.[2] The trial and appellate courts were in agreement, however, in rejecting the Government's contention that the "scope of the project" issue was for the trial judge to decide and should not, therefore, have been submitted to the jury at all. There being a conflict between the circuits on this question,[3] we granted certiorari to consider a recurring problem of importance in federal condemnation proceedings. 396 U. S. 814.

The Fifth Amendment provides that private property shall not be taken for public use without just compensation. And "just compensation" means the full monetary equivalent of the property taken.[4] The owner is to be put in the same position monetarily as he would have occupied if his property had not been taken.[5] In enforcing the constitutional mandate, the Court at an early date adopted the concept of market value: the owner is entitled to the fair market value of the property [6] at the

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acres were not referred to in a design memorandum submitted in June 1959. They were, however, designated for taking in a memorandum approved in October of that year. It has been Government policy to build recreational areas in conjunction with federal reservoir projects since 1944. Act of December 22, 1944, § 4, 58 Stat. 889.

[2] *United States* v. *811.92 Acres of Land*, 404 F. 2d 303.

[3] The Court of Appeals for the Fifth Circuit has held that the "scope of the project" issue is to be determined by the trial judge. *Wardy* v. *United States*, 402 F. 2d 762, 763.

[4] *Monongahela Navigation Co.* v. *United States*, 148 U. S. 312, 326.

[5] *United States* v. *New River Collieries Co.*, 262 U. S. 341, 343; *Seaboard Air Line R. Co.* v. *United States*, 261 U. S. 299, 304.

[6] *New York* v. *Sage*, 239 U. S. 57, 61; *Boom Co.* v. *Patterson*, 98 U. S. 403, 408.

time of the taking.[7] But this basic measurement of compensation has been hedged with certain refinements developed over the years in the interest of effectuating the constitutional guarantee. It is one of these refinements that is in controversy here.

The Court early recognized that the "market value" of property condemned can be affected, adversely or favorably, by the imminence of the very public project that makes the condemnation necessary.[8] And it was perceived that to permit compensation to be either reduced or increased because of an alteration in market value attributable to the project itself would not lead to the "just compensation" that the Constitution requires.[9] On the other hand, the development of a public project may also lead to enhancement in the market value of neighboring land that is not covered by the project itself. And if that land is later condemned, whether for an extension of the existing project or for some other public purpose, the general rule of just compensation requires that such enhancement in value be wholly taken into account, since fair market value is generally to be determined with due consideration of all available economic uses of the property at the time of the taking.[10]

In *United States* v. *Miller*, 317 U. S. 369, the Court gave full articulation to these principles:

> "If a distinct tract is condemned, in whole or in part, other lands in the neighborhood may increase in market value due to the proximity of the public improvement erected on the land taken. Should

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[7] *Kerr* v. *South Park Commissioners*, 117 U. S. 379, 386.

[8] *Shoemaker* v. *United States*, 147 U. S. 282, 304–305.

[9] *United States* v. *Virginia Electric & Power Co.*, 365 U. S. 624, 635–636; *United States* v. *Cors*, 337 U. S. 325, 332–334.

[10] *United States* v. *Chandler-Dunbar Water Power Co.*, 229 U. S. 53, 81; *Boom Co.* v. *Patterson*, *supra*.

the Government, at a later date, determine to take these other lands, it must pay their market value as enhanced by this factor of proximity. If, however, the public project from the beginning included the taking of certain tracts but only one of them is taken in the first instance, the owner of the other tracts should not be allowed an increased value for his lands which are ultimately to be taken any more than the owner of the tract first condemned is entitled to be allowed an increased market value because adjacent lands not immediately taken increased in value due to the projected improvement.

"The question then is whether the respondents' lands were probably within the scope of the project from the time the Government was committed to it. If they were not, but were merely adjacent lands, the subsequent enlargement of the project to include them ought not to deprive the respondents of the value added in the meantime by the proximity of the improvement. If, on the other hand, they were, the Government ought not to pay any increase in value arising from the known fact that the lands probably would be condemned. The owners ought not to gain by speculating on probable increase in value due to the Government's activities." 317 U. S., at 376–377.

There is no controversy in the present case regarding these basic principles. The parties agree that if the acreage in issue "was probably within the scope of the project from the time the Government was committed to it," substantially less compensation is due than if it was not. For if the property was probably within the project's original scope, then its compensable value is to be measured in terms of agricultural use. If, on the other hand, the acreage was outside the original scope of the project, its compensable value is properly measur-

able in terms of its economic potential as lakeside residential or recreational property.

The issue between the parties is simply whether the "scope of the project" question is to be determined by the trial judge or by the jury. There is no claim that the issue is of constitutional dimensions. For it has long been settled that there is no constitutional right to a jury in eminent domain proceedings. See *Bauman* v. *Ross*, 167 U. S. 548, 593. As Professor Moore has put the matter:

> "The practice in England and in the colonies prior to the adoption in 1791 of the Seventh Amendment, the position taken by Congress contemporaneously with, and subsequent to, the adoption of the Amendment, and the position taken by the Supreme Court and nearly all of the lower federal courts lead to the conclusion that there is no constitutional right to jury trial in the federal courts in an action for the condemnation of property under the power of eminent domain." [11]

It is not, therefore, to the Seventh Amendment that we look in this case, but to the Federal Rules of Civil Procedure. Rule 71A (h) provides that, except in circumstances not applicable here, "any party" to a federal eminent domain proceeding "may have a trial by jury of the issue of just compensation," unless the court in its discretion orders that that issue "shall be determined by a commission of three persons appointed by it. . . . Trial of all issues shall otherwise be by the court." [12] The Rule

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[11] 5 Moore's Federal Practice ¶ 38.32 [1], at 239 (2d ed. 1969). (Footnote omitted.)

[12] The full text of Rule 71A (h) is as follows:

"If the action involves the exercise of the power of eminent domain under the law of the United States, any tribunal specially constituted by an Act of Congress governing the case for the trial of the issue of just compensation shall be the tribunal for the deter-

thus provides that, except for the single issue of just compensation, the trial judge is to decide all issues, legal and factual, that may be presented. The critical inquiry is thus whether "the issue of just compensation," as that phrase is used in the Rule, is broad enough to embrace the question whether the condemned property was probably within the scope of the federal project.[13]

Although the matter could be decided either way without doing violence to the language of Rule 71A (h), we think the Rule's basic structure makes clear that a jury in federal condemnation proceedings is to be confined to the performance of a single narrow but important function—the determination of a compensation award within ground rules established by the trial judge. The

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mination of that issue; but if there is no such specially constituted tribunal any party may have a trial by jury of the issue of just compensation by filing a demand therefor within the time allowed for answer or within such further time as the court may fix, unless the court in its discretion orders that, because of the character, location, or quantity of the property to be condemned, or for other reasons in the interest of justice, the issue of compensation shall be determined by a commission of three persons appointed by it. If a commission is appointed it shall have the powers of a master provided in subdivision (c) of Rule 53 and proceedings before it shall be governed by the provisions of paragraphs (1) and (2) of subdivision (d) of Rule 53. Its action and report shall be determined by a majority and its findings and report shall have the effect, and be dealt with by the court in accordance with the practice, prescribed in paragraph (2) of subdivision (e) of Rule 53. Trial of all issues shall otherwise be by the court."

[13] In *United States* v. *Miller*, *supra*, it appears that that question was decided by the trial judge, who excluded all evidence of enhanced value attributable to the project. 317 U. S., at 372–373. While this Court's opinion in *Miller* approved of that procedure, it is to be remembered that the case was decided before the adoption of Rule 71A (h) in 1951, at a time when federal courts in condemnation proceedings followed the procedures of the States in which they were located. See Advisory Committee Notes to Rule 71A; 7 Moore, *supra*, ¶ 71A.03, at 2716.

Rule gives the trial court discretion to eliminate a jury entirely. And when a jury is afforded, the sweeping language of the final sentence of the Rule discloses a clear intent to give the district judge a role in condemnation proceedings much broader than he occupies in a conventional jury trial. It is for him to decide "all issues" other than the precise issue of the amount of compensation to be awarded. It follows that it is for the judge to tell the jury the criteria it must follow in determining what amount will constitute just compensation, and that in order to do so he must decide the "scope of the project" issue as a preliminary matter. We therefore approve and adopt the procedural rule announced by the Court of Appeals for the Fifth Circuit in *Wardy* v. *United States*, 402 F. 2d 762, and hold that it is for the judge and not the jury to decide whether the property condemned was probably within the project's original scope.[14]

Finally, the Government asks us to take this occasion to "clarify" the "scope of the project" test. We think the test was stated with admirable clarity by a unanimous Court in *Miller:* if the "lands were probably within the scope of the project from the time the Government was committed to it," no enhancement in value attrib-

[14] "The question was whether appellants' 'lands were probably within the scope of the project from the time the Government was committed to it.' . . . Appellants contend that the jury should have been allowed to answer this question. Under Rule 71A (h) the jury's function is limited to determining 'just compensation.' It is the duty of the court to decide the legal issues, as well as all other fact issues. [Citations omitted.] Thus, instead of infringing on the jury's functions, the judge merely decided a legal question which limited the factors necessary to the determination of 'just compensation.'" *Wardy* v. *United States*, 402 F. 2d, at 763. See also *Scott Lumber Co.* v. *United States*, 390 F. 2d 388, 392 (C. A. 9th Cir.); *United States* v. *91.69 Acres of Land*, 334 F. 2d 229, 231–232 (C. A. 4th Cir.).

utable to the project is to be considered in awarding compensation. As with any test that deals in probabilities, its application to any particular set of facts requires discriminating judgment.[15] The rule does not require a showing that the land ultimately taken was actually specified in the original plans for the project. It need only be shown that during the course of the planning or original construction it became evident that land so situated would probably be needed for the public use.

The judgment of the Court of Appeals is vacated, and the case is remanded to the United States District Court for the Western District of Kentucky for further proceedings consistent with this opinion.

It is so ordered.

[15] Compare *John L. Roper Lumber Co.* v. *United States*, 150 F. 2d 329, 332, with *Scott* v. *United States*, 146 F. 2d 131, 132–133.

SUPREME COURT OF THE UNITED STATES

No. 88.—October Term, 1969

United States, Petitioner,
v.
W. G. Reynolds et ux.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit.

[February 24, 1970]

Mr. Justice Douglas, with whom Mr. Justice Black concurs, dissenting.

All constitutional questions aside, there was in the present case a right to trial by jury on "the issue of just compensation" as provided in Rule 71A (h). I do not see how "the issue of just compensation" can be decided without considering whether or not the property was probably within or not within the project's original scope. As the opinion of the Court makes plain, important questions of value turn on that decision. In this case it is seen in the difference between the value of the property as agricultural land and its value as potential lakeside residential or recreational property.

If it were certain beyond doubt that the property was within the original scope of the project, a different question might be presented. But there is nothing in this record to show that respondent's property was included in the original design. We deal here with probabilities or perhaps with possibilities. If the property were not within the original design, a purchaser could reasonably anticipate that he would be able to devote the land to its highest economic use reflected in part by its proximity to the government's project. Henry George [1] would have it otherwise; but that has not been the direction of our

[1] Progress and Poverty Book VI (15th Ann. ed. 1945).

economy. Hence what we are talking about is market value and that in turn includes all of the ingredients that make up price. The most central element of price in the area now litigated was the relation of the land to the original project and that issue was one of fact. The "issue of just compensation" [2] as used in Rule 71A (h) truly cannot be resolved without considering that question.

There seems to be no reason why the jury chosen by Congress to decide the final issue of "just compensation" should be denied the power to determine the subordinate issues of fact upon which the jury's final verdict must rest.

There are powerful forces loose in this country that deprecate the use of juries. The Department of Justice and other federal agencies [3] often seem to dislike juries in

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[2] In *United States* v. *Certain Lands*, 144 F. Supp. 206, a road was taken and the question of "just compensation" turned on whether the construction of a substitute facility was necessary. The court held that that issue of necessity was properly left to the jury:

"In the average condemnation proceeding, many factors must be considered in arriving at just compensation, factors which are only established and available after the exercise of a fact-finding process. There appears to be no reason for introducing a trial by jury into condemnation proceedings unless the jury's province is broad enough to include the weighing of evidence which directly relates to the issue of compensation. It would seem that in this case the determination as to whether any substitute facilities are required at all is indeed a part of the 'issue of just compensation,' one of the factors to be taken into account by the jury in reaching its verdict." *Id.*, at 214.

[3] The present Rule 71A, which in absence of an Act of Congress gives the courts discretion to have the issue of compensation decided by a commission of three, was inspired by the Act governing condemnations by the TVA. See Notes of Advisory Committee, 28 U. S. C., following Rule 71A. But that Act was amended in 1967. See 16 U. S. C. § 831X (Supp. IV). Under the amendment either party has on demand "an absolute right to a trial by jury." S. Rep. No. 930, 90th Cong., 1st Sess., 2. "Proponents of the legislation

condemnation cases. In my Circuit, juries have unexpectedly risen up in favor of homeowners and against Washington, D. C., and granted "just compensation" in large sums, in retaliation, it is believed, against hard-nose officials who, with all the power of the central government, seek to plow them under. At other times the jury has acted differently and cut down the award.[4] Juries in these condemnation cases perform, in other words, an historic restraint on both executive and judicial power. See *Bushell's case.* 6 How. St. Tr. 999, decided in 1670.

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indicated that no landowner should be denied his basic right to a trial by jury involving the condemnation of his property. In addition, it was indicated that the absence of a right to a jury trial had generated friction between TVA and landowners which was seriously affecting the public relations of that agency." *Ibid.*

The Senate Committee stated: "While the committee makes no judgment as to the benefits of either the commissioner or jury-trial system, it does feel that a right to trial-by-jury is basic to our American way of life, and accordingly recommends adoption of this legislation." *Id.*, at 3.

[4] See *John L. Roper Lbr. Co.* v. *United States,* 150 F. 2d 329, where the jury refused the land owner any increment of value occasioned by the land's proximity to the project.